No. 47305-4-II

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

BRITT EASTERLY, ELZY EDWARDS and CLIFFORD EVELYN,

Appellants,

v.

CLARK COUNTY,

Respondent.

BRIEF OF APPELLANTS

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A. INTRODUCTION

The Clark County Sheriff's Office ("County") has a systemic problem with race relations. Even in this day and age, when many institutions have at least managed to subdue overtly discriminatory acts, the County's African-American employees have been subjected to inmates shouting "nigger" while Caucasian co-workers look on and laugh, and co-workers emailing pictures of African warriors in grass skirts and headdresses and sarcastically asking if that was what their African-American colleague looked like on vacation. Discrimination at the County also manifested itself in other, more subtle ways, such as skewing the application process to deny employment to an African-American applicant, even though a Caucasian applicant with similar "background" issues was hired.

This problem is not solely limited to Caucasian leaders at the County; Chief Jackie Batties, an African-American woman, said that she does not like "black men who date white women" and treated her African-American subordinate commander differently than other Caucasian commanders.

Three African-Americans who were discriminated against by the County -- Britt Easterly, Elzy Edwards, and Clifford Evelyn – filed a complaint alleging *inter alia* disparate treatment and hostile work

environment claims under the Washington Law Against Discrimination, RCW ch. 49.60 ("WLAD").

The County moved for summary judgment on all three men's claims. The trial court concluded that one of the three, Easterly, had alleged sufficient facts upon which a jury could decide that Easterly had experienced a hostile work environment at the County because of his race, and that the County had subjected him to disparate treatment because of his race.

Despite the fact that the County must face trial on Easterly's claims, the trial court concluded that neither Evelyn nor Edwards had presented sufficient evidence of disparate treatment, and that Evelyn had not demonstrated a hostile work environment as a matter of law.

Summary judgment here was improper. Reasonable minds could disagree about the evidence Evelyn and Edwards presented. Each man alleged sufficient material facts to support their claims, and each demonstrated that there was a pattern and practice of overt and covert race discrimination at the County. Summary judgment on Evelyn's and Edwards' claims must be reversed.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering summary judgment in favor of the County on Evelyn's and Edwards' claims in its order dated December 11, 2014.

(2) Issues Related to Assignments of Error

1. In response to a summary judgment motion on his disparate treatment refusal-to-hire claim under WLAD, did Edwards establish the prima facie element of qualification for the position when he advanced through three levels of the hiring process, and was only rejected because a racially motivated interviewer disliked his personal "background?"

2. In response to a summary judgment motion on his disparate treatment refusal-to-hire claim under WLAD, did Edwards establish that the ultimate decision maker who rejected him was influenced by others advising that decision maker, and that those advisors treated him differently because of his race?

3. In response to a summary judgment motion on his disparate treatment claim under WLAD, did Evelyn establish that the ultimate decision maker, though an African American woman herself, expressed discriminatory animus against black men who dated white women?

4. In response to a summary judgment motion on his hostile work environment claim, under WLAD, did Evelyn establish that he experienced a hostile work environment, both in the form of overt and covert hostile actions over the course of many years?

5. Did Evelyn establish a disputed issue of material fact that a highly questionable investigation of Evelyn's

interactions with contractors at the County was mere pretext for his dismissal?

C. STATEMENT OF THE CASE

The complaint and caption reflect that racial discrimination claims were brought against the County by three African-Americans: Britt Easterly, Elzy Edwards, and Clifford Evelyn. CP 1-20. Easterly and Evelyn both worked for the County for many years, Edwards applied for a position with the County and was ultimately rejected. CP 1563, 1854. All three men contended they had experienced disparate treatment by the County. CP 1-20. Easterly and Evelyn also both claimed they experienced a hostile work environment. *Id.* The County moved for summary judgment on all three mens' claims. CP 72-187. The trial court granted summary judgment to the County as to Edwards and Evelyn, concluding as a matter of law that neither man presented any disputed issue of fact that he was discriminated against in any way. CP 2384. However, the trial court concluded that Easterly had raised genuine issues of material fact on his hostile work environment and disparate treatment claims, and ordered a trial. *Id.*[1]

[1] Easterly thus has claims remaining to be litigated at the trial court, and was not the subject to the CR 54(b) order from which Edwards and Evelyn appealed. CP 2373. However, because Easterly contends that the facts and claims presented by Edwards and Evelyn demonstrate a pervasive problem of race discrimination at Clark County, he has an interest in the outcome of their appeal. He moved for a stay of trial on his claims pending the outcome of this appeal, but was denied. *Id.*

(1) Facts and Background Relating to the Failure to Hire Disparate Treatment Claim of Elzy Edwards

Edwards' WLAD claim arises from disparate treatment he received because he is African-American. CP 1-20. Edwards claimed he applied for Custody Officer Position with the County and was denied due to race. *Id.* He maintained that Breanne Nelson and Timothy Hockett, who investigated and participated in the selection process, heavily influenced the judgment of the ultimate decision maker. *Id.*

An application for Custody Officer is a four-step process. The first stage is written testing and oral interviews, the second stage is a background investigation, the third stage is a "Rule of Three" panel interview, and the fourth stage is review by the sheriff. CP 1164-65. Edwards passed the written and oral exams with high marks and made it to stage two. CP 1169. He was then investigated by Detective Timothy Hockett. *Id.* Although the County insisted in briefing below that Hockett approved a disproportionate number of "minorities" as candidates, it does not say "minorities" from which race or races. CP 90.

Despite the fact that Edwards' second stage interview had been scheduled, Hockett rescheduled it to the Martin Luther King Jr. holiday celebrating the civil rights gains of African Americans. CP 1243, 1675. Edwards did not object for fear of seeming uncooperative. CP 1676. No

other interviews were scheduled that day. CP 92. The County claimed below that Hockett had no idea what race Edwards was until the interview. CP 92. However, Hockett had a form indicating Edwards' race and a photo identification of Edwards in his investigative file, which he had reviewed to prepare for the interview. CP 1244-46.

Hockett's interview was more like an interrogation of a criminal suspect than a job interview. CP 1169-71. Hockett held against Edwards incidents of "police contact" where Edwards was actually the complainant, not the accused, and also financial challenges common to many people. CP 1171. Hockett characterized Edwards' accidental retention of cable boxes, which professional movers accidentally packed when Edwards moved from Florida, as "felony theft." CP 1171, 1174. Hockett ignored Edwards' explanations as to why returning cable boxes to a company in another state can be challenging, particularly when that cable company had recently changed ownership. CP 1281, 1674. Hockett faulted Edwards for having a high American Express balance despite the fact that his significant other had incurred the charges and could pay the bill easily. CP 1279. Hockett also questioned Edwards' supposed failure to disclose old arrests in Hawaii related to unpaid traffic tickets, even though Edwards had recalled and disclosed another, more serious arrest and had

supplemented his statement to include the Hawaii information. CP 1172, 1674.

Another applicant for the same position, who was Caucasian, was also interviewed by Hockett. CP 1180. A County investigator later compared Hockett's treatment of that applicant to Edwards' treatment, and found that they were treated very differently. CP 1180-85. Despite sharing many of similar "faults" to Edwards, Hockett approved the Caucasian applicant and denied Edwards. *Id.* The County investigator found the differences in treatment of Edwards and the Caucasian applicant "startling." CP 1182.

Edwards complained about Hockett's treatment of him in the interview. CP 1169. The County employee to whom Edwards complained reviewed the recording and suggested assigning another investigator. The County refused. CP 1169, 1175.

Another Caucasian applicant also complained about Hockett's interview and *was* assigned a new investigator. CP 1181. The County later removed Hockett from all his investigative assignments, but still did not remedy Edwards' complaint. CP 38.

Although Hockett declined Edwards, he appealed that decision and was reinstated to the process. CP 1170, 1410. He was advanced to the third stage, the Rule of Three interview. CP 1170. During the Rule of

Three interview process however, Edwards was again treated differently. CP 1177-79. County Human Resource Specialist Breanne Nelson broke rules and took actions to influence the panel against Edwards, including:

- Telling the panelists that Edwards had been removed from consideration by Hockett, despite the fact that Edwards had won his appeal;
- Discussing the details of Hockett's background investigation with the panel when she was not tasked with doing so;
- Telling the panelists that Edwards had bumped a "good" or "viable" candidate;
- Acting upset that Edwards was being interviewed;
- Telling the panelists she "didn't know if the Sheriff was going to want to hire [Edwards]"; and
- Admonishing the panel after it approved Edwards as a candidate that the Sheriff would be disappointed that they did not back up Hockett's previously overruled decision.

Id. In fact, Nelson's interference with the Rule of Three panel's work was so interfering and unusual the moderator asked Nelson more than once to be quiet and let the panel do their job. CP 1198. *The County investigator said it was difficult to decide if Nelson was motivated by race discrimination.* CP 1186.

Despite Nelson's best efforts to persuade the panel to reject Edwards, he was chosen as a suitable hire after the Rule of Three interview. CP 1170-71. However, Nelson's interference caused a split in

the panel; one of the three panelists wanted to reject Edwards because of the "background" issues Nelson raised. *Id.*

Nelson, dissatisfied with the panel's majority decision, took the matter to Undersheriff Dunegan. CP 1180. Dunegan rejected Edwards based on Nelson's representations. CP 1180. A Caucasian applicant with similar "background" issues was selected instead of Edwards. CP 1182.

After Edwards' rejection by the County, Washington State Corrections and Oregon State Corrections both offered Edwards jobs; he took the job offer with Washington State Corrections. CP 1673. The County decided "procedural errors" had affected Edwards' application process and offered to reinstate him to the process. CP 456. However, Edwards was already working for Washington State. CP 1673.

(2) Facts and Background Relating to Claims of Clifford Evelyn

Evelyn's WLAD claims arise from disparate treatment he received, and a hostile work environment he experienced, because he is African-American. CP 1-20.

Evelyn was employed by the County from 1989 to June 25, 2009. CP 1055. After he was hired, he was promoted and eventually became a commander of the Custody Branch. CP 1. As a commander, Evelyn reported to Chief Jackie Batties. CP 1649.

Chief Batties told Evelyn and another African-American officer that she had issues with black men who date white women. CP 1483, 1651. Evelyn was married to a white woman. CP 1054. The County did not believe that the statement constituted evidence that Batties discriminated on the basis of race. CP 1651.

Batties frequently criticized, belittled, reprimanded and disciplined Evelyn, much more than with other commanders. CP 1649-52, 1693. Batties and the County treated Evelyn differently than Caucasian commanders. CP 1046-47, 1367, 1486-87. For example, Evelyn made a policy decision regarding the very serious security problem of officers losing their security badges. CP 1692. Instead of supporting Evelyn, Batties attacked him. *Id.*

Inmates would call Evelyn "nigger" in front of other Caucasian commanders, but they would simply laugh and refused to correct the inmates. CP 1686, 1708. Britt Easterly, Evelyn's subordinate, was sent a photo of an African man in a grass skirt, which had a handwritten note on it that said "871 on Vacation." CP 1325. 871 was Easterly's badge number. CP 1432. The County in pleadings below tried to gloss over this very serious and offensive evidence of racial bias by calling it the "Dove picture posting incident" and claiming it resolved the matter by "reinforcing" its harassment policy. CP 113.

Batties allowed Evelyn to be subjected to a baseless criminal assault charge for tripping and grabbing another employee to avoid falling while exiting a malfunctioning elevator. CP 1687-90. The elevator had mechanical issues in not lining up with the floor. *Id.* Batties later said she found it "credible" that Evelyn had tripped when he fell into the employee, but Batties signed off on a Notice of Complaint. *Id.* Batties said she did not speak with the employee prior to filing the complaint. Batties was involved with the decision to send the complaint to Internal Affairs ("IA"). Batties did not come to Evelyn to ask him what happened. *Id.*

When IA first approached Evelyn about the situation, the investigation was not a criminal investigation. *Id.* Moreover, Dunegan testified that he would not have considered the alleged "unwanted touching" a major crime. CP 1770.

On another occasion, Evelyn complained to Batties when he believed treatment of another officer was race-based, but Batties disregarded his concerns. CP 1695-97. Instead, Batties forced the officer to confront the offending commander, after which the officer recanted. *Id.*

Batties had an opportunity to get rid of Evelyn when he got on the bad side of the employees of Wexford, an independent contractor with the County. CP 1701-02. Evelyn made legitimate complaints about the

performance of Wexford employees that endangered both inmates and jail personnel. *Id.*

In response to a Wexford employee's complaint about Evelyn, IA investigator Dennis Pritchard wrote to Batties that the complaint did not describe "harassment" and that no investigation was necessary. CP 1484. Batties pursued the matter, meeting with the complainant. CP 1485. Shortly after meeting with Batties, the complainant issued a *new* complaint with the requisite statements about lewd and inappropriate comments from Evelyn that would prompt an investigation. CP 1486-87.[2]

What followed was a biased and deeply flawed investigation conducted not by an outside investigator, but by Candy Arata, who worked in Human Resources ("HR"). CP 1063-66, 1720. Arata admitted that she felt an outside investigator was likely appropriate, but did not make this suggestion to the County. CP 1718. Arata asked the interviewees whether they had spoken with Evelyn, but did not recall if she asked whether they had conferred amongst themselves. CP 1722. Arata asked leading questions. CP 1724-25. For example, she said to one employee "Tell me about the hostile language. *And I can give you your sentence if that's helpful.*" CP 1617 (emphasis added). To another, she

[2] Evelyn does not downplay the seriousness of the conduct of which he is accused. The accusations include highly offensive and vile statements. However, accusations are not facts.

asked, "You said that he made a couple of sexual comments to her, and my question is, was one of them to do with being cold, as in you could tell from her breasts that she was cold?" CP 1624. Arata recounted the alleged statement "once you go black" to every single interviewee, seeking corroboration. CP 1731-32. One woman even confirmed having heard the "once you go black" comments, then immediately retracted that confirmation. CP 1728. Arata also repeatedly in interviews referred to the complainants as "victims" of Evelyn, even though she knew that was an improper and inflammatory term. CP 1721.

Arata's suggestive interview tactics yielded results: as the County's summary judgment brief records, most of those interviewed claimed that Evelyn had made virtually identical comments to multiple people on multiple occasions. CP 118-31.

However, the method of investigation, Evelyn's initial criticism of the Wexford employees' work that may have offended them, and Evelyn's long history at the County without such complaints from County employees, raises doubts about the efficacy of Arata's investigation. CP 1721. Evelyn was terminated. CP 1566-67. However, after passing extensive background checks, Evelyn was subsequently hired by the United States Secret Service. CP 1049.

Edwards, Evelyn, and Easterly each filed a tort claim form. CP 1554-62. When the County failed to address their concerns, they filed their complaint more than 60 days later. CP 1.

D. ARGUMENT

(1) Standard of Review

This Court reviews an order granting summary judgment de novo, engaging in the same inquiry as the superior court. *Hiatt v. Walker Chevrolet Co.,* 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Kirby v. City of Tacoma,* 124 Wn. App. 454, 463, 98 P.3d 827 (2004). This Court considers all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Kirby,* 124 Wn. App. at 463. Only if reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is proper. *Haubry v. Snow,* 106 Wn. App. 666, 670, 31 P.3d 1186 (2001).

The State of Washington has a strong policy against racial discrimination in the workplace. RCW 49.60.030. WLAD "expresses a public policy of the highest priority." *Int'l Union of Operating Engineers*

v. Port of Seattle, 176 Wn.2d 712, 721, 295 P.3d 736 (2013). WLAD goes beyond Title VII, in part because it contains a provision requiring liberal construction that is not contained in Title VII. RCW 49.60.010 ("The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state"); *Hiatt,* 64 Wn. App. at 99 n.2, *citing Allison v. Housing Auth.,* 118 Wn.2d 79, 821 P.2d 34 (1991). In short, the clear legislative intent is that WLAD is a dynamic instrument, to be liberally and broadly construed. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers,* 151 Wn.2d 203, 214, 87 P. 3d 757 (2004).

To defeat an employer's motion for summary judgment in an employment discrimination case, an employee must establish *specific and material facts* to support each element of her prima facie case. *Hiatt,* 120 Wn.2d at 66.

Federal employment law rulings are a source of guidance when construing provisions under WLAD, but they are not binding precedent. *Grimwood v. Univ. of Puget Sound, Inc.,* 110 Wn.2d 355, 361–62, 753 P.2d 517 (1988). *However*, this Court has adopted the relevant federal test from Title VII on summary judgment in WLAD claims. *Fulton v. State,*

Dep't of Soc. & Health Servs., 169 Wn. App. 137, 148, 279 P.3d 500 (2012).

(2) There Are Disputed Issues of Material Fact Regarding Whether Edwards Received Disparate Treatment Because of His Race

(a) Legal Framework of Disparate Treatment Claims

RCW 49.60.180 establishes that discrimination on the basis of race by an employer is an unfair practice. Specifically, employers may not discriminate against "any person in ... terms or conditions of employment because of ... race...." RCW 49.60.180(3); *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn. App. 212, 226-27, 907 P.2d 1223, 1231-32 (1996). To establish a prima facie case of racial discrimination due to disparate treatment, an employee must show an employer "treats some people less favorably than others because of their race...." *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 1854 n.15, 52 L. Ed. 2d 396 (1977)).

Employment discrimination includes discrimination in hiring decisions. RCW 49.60.180(1); *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 493, 205 P.3d 145 (2009) ("Adverse employment action" is simply another way to describe "discipline, demotion or failure to hire"); *Texas*

Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

A *prima facie* case of racial discrimination in hiring decisions sufficient to survive summary judgment is established by the same test as in other employment discrimination claims. The plaintiff must show that: 1) he is a member of a protected class; 2) he was a qualified applicant; 3) he was not hired; and 4) the position remained open and the employer continued to seek other applicants of the plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) *holding modified on other grounds by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).

After a *prima facie* case been established, the burden shifts to the employer to demonstrate that race was not a motivating factor in the failure to hire. *Estevez v. Faculty Club of Univ. of Washington*, 129 Wn. App. 774, 799, 120 P.3d 579 (2005).

Then, the burden shifts back to the employee to demonstrate the employers' proffered non-discriminatory reason is pretextual. *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003); *Estevez*, 129 Wn. App. at 800-01. At the summary judgment stage of pretext, the plaintiff must provide evidence that supports an inference that discrimination was a "substantial factor" motivating the employment

decision. *Allison v. Housing Auth.*, 118 Wn.2d at 84, 95–97. *See also, Desert Palace,* 539 U.S. at 101, *citing* 42 U.S.C. § 2000e–2(m) (claimant need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice."). An employee may prove the employer's reasons were pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Godwin v. Hunt Wesson, Inc.,* 150 F.3d 1217, 1220, 80 Fair Empl. Prac. Cas. (BNA) 890 (9th Cir. 1998), quoting *Burdine,* 450 U.S. at 256.

When the plaintiff offers direct evidence of discriminatory motive in a Title VII claim, "a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Godwin,* 150 F.3d at 1221. However, because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate pretext. *Vasquez v. State, Dep't of Soc. & Health Servs.*, 94 Wn. App. 976, 985, 974 P.2d 348 (1999).

Once a court determines that the parties have met all three *McDonnell Douglas* intermediate burdens and that the record contains *reasonable but competing* inferences of *both* discrimination *and*

nondiscrimination, "it is the jury's task to choose between such inferences." *Hill v. BCTI Income Fund-I,* 144 Wn.2d 172, 186-87, 23 P.3d 440, 449 (2001), *as amended on denial of reconsideration* (July 17, 2001); *Carle v. McChord Credit Union,* 65 Wn. App. 93, 102, 827 P.2d 1070 (1992) (citing *United States v. Stanley,* 928 F.2d 575, 577 (2d Cir.), *cert. denied,* 502 U.S. 845, 112 S. Ct. 141, 116 L. Ed. 2d 108 (1991)); *see also, Hume v. Am. Disposal Co.,* 124 Wn.2d 656, 667–68, 880 P.2d 988 (1994) ("When all three facets of the [*McDonnell Douglas*] burden of production have been met, the case must be submitted to the jury." (quoting *Carle,* 65 Wn. App. at 102, 827 P.2d 1070)). The trier of fact must then hear and evaluate the parties' dueling explanations for the adverse action and *reasonably* determine whether the plaintiff has carried his or her *ultimate* evidentiary burden. That *ultimate* burden in cases brought under RCW 49.60.180 is to present evidence sufficient for a trier of fact to reasonably conclude that the alleged unlawfully discriminatory animus was more likely than not a substantial factor in the adverse employment action. *Mackay v. Acorn Custom Cabinetry, Inc.,* 127 Wn.2d 302, 311, 898 P.2d 284 (1995).

(b) Edwards Established a Prima Facie Case, Including His Qualification for the Position Was Qualified; they County's Contentions Below Did Not Relate to the Qualifications to Be a Custody Officer

The County's attacked Edwards' *prima facie* case of disparate treatment based on his supposed lack of "qualification." CP 134. The County claimed that it did not hire Edwards because his "background" made him "unqualified." CP 134-35. It claimed that omissions on his personal statement and his retention of two cable boxes that professional movers accidentally packed in Florida meant that he could not establish the *prima facie* element of qualification. *Id.*

The County misconstrued the term "qualified" in the discrimination context. "Qualified" simply means capable of performing the job for which the candidate applied. *Dedman v. Washington Pers. Appeals Bd.*, 98 Wn. App. 471, 484, 989 P.2d 1214, 1221 (1999). The County never averred that Edwards was incapable of performing the duties of a custody officer. CP 134-35. The County's real issue with Edwards was its criticism of his "background" as characterized by Hockett. *Id.* Hockett's criticisms do not relate to job qualifications, but to non-job related matters such as credit history and a perceived lack of candor on an application form. *Id.*

Also, the Hockett interview had substantial flaws. CP 1171-98. The County subsequently *dismissed* Hockett from that duty after a white applicant complaint, and even suggested later that Edwards might fare better with another interviewer. CP 38, 1169-75. Despite Nelson's vigorous attempts to have Edwards disqualified at the Rule of Three interview, the panel approved his hiring. CP 1181-82. Even after Nelson succeeded in lobbying Dunegan to decline Edwards, the County later extended an offer to Edwards to be reinstated to the process. CP 456. The County's claim that Edwards was unqualified as a matter of law does not withstand the rigorous summary judgment standard, which is supposed to draw inferences in favor of Edwards.

In addition to pointing out the logical flaw in the County's claim he was "unqualified," Edwards presented ample evidence below that he was qualified to be a Custody Officer. CP 1169-90. Despite Hockett's biased interview and Nelson's interference, Edwards advanced through the hiring process all the way up to the last stage, and was later asked to return to the process. CP 456. Edwards had the requisite experience and was highly ranked in eligibility. CP 1169-70. In fact, after the County declined to hire him, he was hired to work for the Washington State Department of Corrections. CP 1673.

The County's claim on summary judgment that Edwards was unqualified as a matter of law cannot be sustained. Because that was the County's only challenge to Edwards' *prima facie* case, Edwards thus established a *prima facie* case of race discrimination.

(c) Edwards Presented Sufficient Evidence of Pretext to Reach the Jury on Whether Race Was a Substantial Factor in the Decision Not to Hire Edwards

The County claimed below that even if Edwards had established a prima facie case of racial discrimination, summary judgment was proper because non-discriminatory reasons existed for the County's refusal to hire Edwards. CP 132-43. The County argued there was no evidence of "racial animus" on the part of the ultimate decision maker involved. *Id.* It averred that Edwards' claims were legally insufficient because undersheriff Dunegan, who actually rejected Edwards after the Rule of Three interview, made no direct statements of racial bias. CP 136. The County also stated that Hockett and Nelson made no direct statements of racial bias. *Id.*

The County's arguments should have been rejected for several reasons. First, direct statements of racial bias are not required to take a case of race discrimination to a jury, circumstantial evidence is sufficient. *Sellsted v. Wash. Mut. Sav. Bank,* 69 Wn. App. 852, 860, 851 P.2d 716, *review denied,* 122 Wn.2d 1018, 863 P.2d 1352 (1993). Second, if the

facts show that an ostensibly unbiased decisionmaker was influenced by bias in the process, there is a disputed issue of material fact regarding discrimination. *Staub v. Proctor Hosp.,* 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011); *Bergene v. Salt River Project Agric. Improvement & Power Dist.,* 272 F.3d 1136, 1141 (9th Cir. 2001) ("Even if a manager was not the ultimate decision-maker, that manager's retaliatory motive may be imputed to the company if the manager was involved in the [adverse employment] decision."); *Galdamez v. Potter,* 415 F.3d 1015, 1026 n.9 (9th Cir. 2005) ("Title VII may still be violated where the ultimate decision-maker, lacking individual discriminatory intent, takes an adverse employment action in reliance on factors affected by another decision-maker's discriminatory animus."). Third, denial of knowledge of race when the evidence suggests otherwise can itself be evidence of racial bias. *See* WPI 1.02; *see also, Dumont v. City of Seattle*, 148 Wn. App. 850, 869-70, 200 P.3d 764 (2009) ("employer's explanations may also be considered in determining pretext").

Here, the fact that Dunegan made the decision not to hire Edwards does not exonerate the County as a matter of law because, even assuming there is no direct evidence that Dunegan had racial animus, Dunegan relied on Hockett and Nelson, who showed serious bias against Edwards. CP 1169-90. Hockett and Nelson treated Edwards differently than a white

applicant that the County eventually hired. *Id.* In fact, the County's own investigator could not decide whether or not Nelson was motivated by racial animus. *Id.*

Also, there is sufficient circumstantial evidence of pretext and bias on the part of Nelson and Edwards to take this case to a jury. Edwards provided evidence that the reasons offered for treating him differently and not hiring him were unworthy of credence. The County did treat a white applicant differently than Edwards, one with a troubling "background" like one it says disqualified Edwards. *Id.* It denies that Hockett or Dunegan knew Edwards' race; the former assertion is absurd and the latter has no basis in the record. CP 1244-46. The County also repeatedly asserts that Hockett could not be biased because he had hired a disproportionate number of "minorities," but it does not indicate that they were African-Americans. CP 90. One might not be biased against Asians, Latinos, or other groups, and yet be biased against African-Americans.

The County subjected Edwards to an overly long and unduly aggressive interview. Hockett conducted an unusually lengthy, unprofessional and abusive background interview while the average is 1.5-2 hours. Moreover, Edwards was rejected by Hockett for leaving out information that would not have automatically disqualified him. After the interview, Edwards expressed concerns about Hockett's conduct. Despite

granting a new background investigator to a Caucasian applicant who also objected to Hockett's conduct, the County HR Manager Candy Arata refused to allow Kathie Back, the County's Chief Examiner for the Civil Service Commission, to assign Edwards a new background investigator.

There are other circumstances that lead to inferences of discrimination and disparate treatment. Hockett scheduled Edwards' interview – and no other – on the Martin Luther King Jr. holiday. Hockett afforded a Caucasian applicant the benefit of the doubt on matters that he held against Edwards. CP 1169-88. Nelson lobbied so vociferously against Edwards in the Rule of Three interview that she was asked by the moderator to stop improperly influencing the panel. *Id.* She also lobbied against him to Dunegan. *Id.* Nelson claimed to have personally objected to a particular candidate on only one other occasion, but even then, Chief Batties denied that Nelson consulted with her. *Id.*

Given all of the evidence before the trial court on summary judgment, Edwards stated a claim for discrimination sufficient to take to a jury. He need not have presented any "smoking gun" statements in order to meet his burdens of showing pretext and substantial motivating factor. The notion that no reasonable jury could find the County's actions were substantially motivated by race, given the complexity of the evidence and the questionable nature of the County's explanations, is unsustainable.

Summary judgment on Edwards's disparate treatment claim must be reversed.

(3) There Are Disputed Issues of Material Fact Regarding Whether Evelyn Experienced Disparate Treatment and a Hostile Work Environment Because of His Race

(a) Evelyn Presented Sufficient Evidence of Disparate Treatment by Batties on Account of Race, Batties Is Not Immune Simply Because She Is the Same Race as Evelyn

At the trial court, the County offered a deceptively simple narrative regarding Evelyn's claims of racial discrimination: (1) Batties is the same race as Evelyn and therefore could not have discriminated against him on that basis, and (2) there is no such thing as "associational discrimination," so Batties' animus against Evelyn must be personal rather than racial. CP 168-76. The County does not deny that Evelyn was repeatedly reprimanded, scolded, disciplined, and ultimately terminated because he was viewed as combative and disrespectful by Batties. *Id.*

Evelyn presented specific evidence of discriminatory animus in the form of a statement by Batties that she does not like black men who date white women. CP 1483, 1651. Evelyn's wife was white. CP 1054. However, the County claimed Batties' actions were solely caused by Evelyn's behavior, and not instigated by Batties' bias. CP 168-76.

There is no bright-line rule that a person is incapable of discriminating against members of his or her own race or other protected class. As the Supreme Court has noted, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)).[3]

The race of the decision maker in a discrimination case is not controlling. *See United States v. Crosby*, 59 F.3d 1133, 1135 n.4 (11th Cir. 1995) (although a Title VII violation may occur even where a supervisor or decision maker is of the same race as the alleged victim, there was no evidence that the Black supervisor held members of his own race to a higher standard of conduct than members of another race) (citing *Billingsley v. Jefferson County*, 953 F.2d 1351, 1353 (11th Cir. 1992) (Title VII cause of action even where decision-maker and employee are of the same race)).

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[3] Although *Oncale* dealt with sexual harassment, the Supreme Court instructs that "[h]ostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment." *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 116 n.10, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1133 n.10 (9th Cir. 2004).

In fact, the Supreme Court does not find identity of gender between the decision maker and the employee in a sex discrimination case to be of much importance. In *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987), a male employee claimed that his employer discriminated against him because of his sex when it preferred a female employee for promotion. Although the Supreme Court ultimately rejected the claim on other grounds, it did not consider it significant that the supervisor who made that decision was also a man. *See id.* at 624–25.

Evelyn raised a disputed issue of material fact regarding whether Batties, despite being of the same race as Evelyn, discriminated against him because she did not like black men who dated white women. This is *direct evidence* discrimination on the basis of race, regardless of the race of the person espousing that view. *See, e.g., Doxie v. Volunteers of Am., Se., Inc.*, 37 F. Supp. 3d 1215, 1226 (N.D. Ala. 2014); *Nichols v. Volunteers of Am., N. Alabama, Inc.*, 470 F. App'x 757, 760 (11th Cir. 2012) (statements that "black men went to white women because all black women were nasty, dumb, stupid, retarded, and worthless, and that [defendants] hated all relationships between black men and white women" sufficient to demonstrate racial animus); *State v. Jordan*, 751 S.W.2d 68, 81 (Mo. Ct. App. 1988); *Reynolds v. Alabama Dep't of Transp.*, 4 F. Supp.

2d 1068, 1077 (M.D. Ala. 1998) (co-worker telling black employee that "having black men around white women made him sick").

The particular social and psychological phenomenon of "hostility by black women" toward interracial marriage was documented in the 10th Circuit case of *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 46 F.3d 1034, 1039 (10th Cir.) *opinion vacated on reh'g sub nom. Fitzgerald v. Mountain States Tel. & Tel. Co.*, 60 F.3d 837 (10th Cir. 1995).[4]

> African American women have historically been victimized by dual societal processes of racism and sexism. Moreover, white women have been held up in American society as models for feminine beauty and sexual attractiveness for men, while African American women ... are rarely portrayed in movies, advertisements or magazines as physically attractive ... When African American men find themselves attracted to white women, it is therefore natural for African American women to view these men as victims of a societal process that takes these men away from potential African American female partners....

Fitzgerald, 46 F.3d at 1039. Although the plaintiffs in *Fitzgerald* were white women who experienced discriminatory treatment by a black woman, under *Oncale* Evelyn is not precluded from raising the same claims simply because he is a black man.

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[4] The original opinion was vacated due to an undisclosed conflict of one of the panel judgment. *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 60 F.3d 837 (10th Cir. 1995). Although the case was ordered resubmitted, a new opinion never issued. Nevertheless, Evelyn does not cite the opinion for any legal authority, but simply to point out that there is a potential sociological explanation for his claim that Batties discriminated against him based on race.

Batties treated Evelyn differently than she did other Caucasian commanders. CP 1054, 1481, 1649-52. She was constantly questioning and undermining him, when she did not do so to others. CP 1053-54. She would reject his proposals for work improvements, only to implement them later at the suggestion of Caucasian commanders. *Id.* When Evelyn tried to raise a serious security issue regarding officers losing their security badges, Batties attacked him. CP 1692. Batties frequently complained that Evelyn was not showing her proper respect, and justified treating other commanders more favorably in matters of intra-office disputes. CP 1481-83.

Batties also ignored or downplayed Evelyn's concerns about race discrimination within the County. A Caucasian commander admitted to saying something racially inappropriate, but Batties did not submit the incident for formal investigation. CP 1481-82. Even Batties' own inappropriate comment about interracial dating should have been formally investigated, but it was not. CP 1483.

Gerald Haynes, a former County employee and African-American, felt that Batties targeted Evelyn because he had complained about racial injustices. CP 1080. Haynes said that he knew Batties "disfavored African-American men who were involved in relationships with Caucasian women" because Haynes, like Batties, was also married to a white woman.

Id. Haynes said the County had a "race-based double standard." CP 1081. Haynes considered joining Evelyn, Edwards, and Easterly in challenging Batties' and the County's racially disparate treatment of him, but decided he wanted to forget about that chapter of his life. *Id.*

Prior to 2008, Evelyn had expressed that he wanted to file a complaint against Batties, but was discouraged from doing so by then HR manager, Bill Barron, who told Evelyn that he (Evelyn) would be considered a whistleblower for doing so. CP 1053. Evelyn submitted a formal complaint against Batties in March of 2008. CP 1649. The investigation into Evelyn's concerns resulted in a finding that scrutinized Evelyn's actions rather than those of Batties. CP 1649-52.

Shortly after his complaint against Batties went nowhere, Batties orchestrated the complaint of harassment in September of 2008 that resulted in his termination. The original complaint from a Wexford employee said nothing about sexual harassment until Batties met privately with the complainant who then rewrote her complaint to include lewd and offensive statements. CP 1484-87. The County's chosen internal investigator, Arata, conducted a highly biased "investigation" of Evelyn's interactions with other contractors who had a motivation to get rid of Evelyn. CP 1701-02. Arata asked highly leading questions, often literally feeding witnesses' statements to "confirm." CP 1063-66, 1617, 1624,

1724-25, 1731-32, 1728. Arata also repeatedly in interviews referred to the complainants as "victims" of Evelyn, even though she knew that was an improper and inflammatory term. CP 1721.

Other Caucasian commanders involved in violations and criminal offenses of a sexual nature were treated better than Evelyn. One Caucasian commander had been having sex with a subordinate while at work and, after investigation, the complaint against him was sustained. CP 1054. He was allowed to keep working for the County. *Id.* Another Caucasian commander was involved in sex-related legal violations and was reinstated, whereupon he offended again. *Id.* Although he was criminally charged, he was allowed to retire with full benefits, rather than being summarily dismissed.

While Batties was also African-American, her actions and stated beliefs raise an inference that she discriminated against members of her own race, particularly Evelyn. A jury must decide if Batties treated Evelyn differently because he was a black man married to a white woman. If so, under *Oncale,* Batties discriminated against him because of his race. The discrimination by Batties involved both the creation of a hostile work environment (as explained below) but ultimately his termination, which was disparate treatment.

(b) Evelyn Presented Sufficient Evidence to Support a Hostile Work Environment Claim

Despite the fact that Evelyn was Easterly's direct supervisor, and worked in the same environment, the trial court concluded that Easterly had presented sufficient evidence of a hostile work environment, but Evelyn had not. CP 2384.

(i) Legal Framework of Hostile Work Environment Claims

With respect to what constitutes a hostile work environment, our Supreme Court has clarified: The scope of the prohibition on employment discrimination "is not limited to 'economic' or 'tangible' discrimination." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993). "Discrimination covers more than 'terms' and 'conditions' in the narrow contractual sense." *Faragher v. Boca Raton,* 524 U.S. 775, 786, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (quoting *Oncale,* 523 U.S. at 78).

As the Supreme Court also stated in *Harris,* "[t]he phrase 'terms, conditions, or privileges of employment' [of 42 U.S.C. § 2000e–2(a)(1)] evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Harris,* 510 U.S. at 21. "Workplace conduct is not measured in

isolation...." *Clark County School Dist. v. Breeden,* 532 U.S. 268, 270, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam). Thus, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris,* 510 U.S. at 21.

Washington courts applying WLAD reference federal law regarding what constitutes a hostile work environment. *Estevez v. Faculty Club of Univ. of Washington*, 129 Wn. App. at 794; *see also, Antonius v. King Cnty.*, 153 Wn.2d 256, 268, 103 P.3d 729, 736 (2004) (applying Supreme Court analysis to a WLAD hostile work environment statute of limitations argument).

To maintain a WLAD hostile work environment claim in the face of a summary judgment motion, Evelyn was required to show that: (1) the harassment was unwelcome, (2) the harassment was because [plaintiff was a member of a protected class], (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer. *Loeffelholz v. Univ. of Washington*, 175 Wn.2d 264, 275, 285 P.3d 854, 859 (2012). The third element is satisfied if the harassment is "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment[,] ... to be determined with regard

to the totality of the circumstances." *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406–07, 693 P.2d 708 (1985).

All of the overtly racial and non-overtly racial hostile acts weave together to form a hostile work environment as long as they are related to each other and not severed by some "intervening action" by the employer. *Antonius,* 153 Wn.2d at 271. "The acts must have some relationship to each other to constitute part of the same hostile work environment claim." *Loeffelholz*, 175 Wn.2d at 276.

(ii) Evelyn Produced Sufficient Circumstantial Evidence of a Hostile Work Environment; He Was Not Required to Produce Evidence of Constant Racist Statements, Which Is Rare

The County argued below that the pervasively hostile treatment by Batties, and the other hostile episodes such as circulation of a racist photo, was merely a series of isolated incidents, and resulted from Evelyn's own "unfounded" complaints and insubordination. CP 109-18, 167. The County claimed that Batties was simply executing of the County's policy for treatment of all its employees. CP 109-18. The County glossed over the very serious incident of distribution of the racist "grass skirt" photo and claims it responded appropriately.[5]

[5] The County downplayed the posting of the repugnant and highly offensive "joke" about Easterly, who was Evelyn's subordinate, by calling it "the Dove picture posting incident." CP 113.

The issue is *not* whether any single action at the County created the hostile work environment; instead, it is the "entire constellation of surrounding circumstances." *Oncale,* 523 U.S. at 82. A thorough examination of the record is required because "the very term 'environment' indicates that allegedly discriminatory incidents should not be examined in isolation." *O'Shea v. Yellow Technology Services, Inc.,* 185 F.3d 1093, 1097 (9th Cir. 1999). Under this interpretation, because conduct which is not [race] based may form a part of the context or environment in which the discriminatory conduct is alleged to have occurred, such conduct may be relevant to, and should be considered in, evaluating a hostile environment claim. *Id.*

Evidence of a general work atmosphere therefore-as well as evidence of specific hostility directed towards the plaintiff-is an important factor in evaluating the claim. *Hicks v. Gates Rubber Co., Inc.,* 833 F.2d 1406, 1415-1416 (10th Cir. 1987). Facially neutral acts can contribute to a hostile work environment: "Facially neutral abusive conduct can support a finding of racial] animus sufficient to sustain a hostile work environment claim when that conduct is viewed in the context of other, overtly discriminatory conduct." *O'Shea* 185 F.3d at 1097; *see also, Kumar v. Gate Gourmet, Inc.,* 180 Wn.2d 481, 503, 325 P.3d 193 (2014).

There is no requirement that to survive summary judgment, a hostile work environment claimant prove intent to discriminate: WLAD and Title VII are not built upon a fault-based tort scheme, but are instead focused on the consequences or effects and not at the motivation of co-workers or employers. *Robel v. Roundup Corp.,* 148 Wn.2d 35, 53 P.3d 611 (2002); *Harris,* 510 U.S. 17.

The constellation of Evelyn's surrounding circumstances suggests a sufficiently hostile work environment to survive summary judgment. Inmates would call Evelyn "nigger" in front of other Caucasian commanders, but they would simply laugh and refused to correct the inmates. CP 1686, 1708. Britt Easterly, Evelyn's subordinate, was sent a photo of an African man in a grass skirt, which had a handwritten note on it that said "871 on Vacation." CP 1325. 871 was Easterly's badge number. CP 1432.

In addition to these overtly racially offensive incidents, the fact that Batties was Evelyn's direct superior put her in a unique position to make Evelyn's work life pervasively hostile. The constant harsh treatment by Batties, her racist statement that she does like black men who date white women, the questioning and undermining by multiple County employees of Evelyn's concerns and complaints about disparity of treatment, culminating in a biased investigation of harassment claims by

the Wexford employees in which Evelyn was painted as the lowest kind of person, made Evelyn's work life miserable and unbearable. CP 1052-55.

The fact that not all of these hostile events were direct statements of racist beliefs is irrelevant. There is direct evidence of racially biased attitudes toward Evelyn, which is the wellspring from which all of the other hostility emanated. Evelyn's hostile work environment claim was wrongly dismissed on summary judgment.

(4) The Claims on Appeal Are Not Time Barred

The County argued below that Evelyn and Edwards' claims were barred by the statute of limitations. These arguments fail.

(a) Edwards and Evelyn's Disparate Treatment Claims are Both Timely

Because WLAD does not establish a specific statute of limitations, courts apply the general three-year limitations period of RCW 4.16.080(2) for separate claims arising from discrete acts of disparate treatment. The measuring date for the limitations period is thus three years and sixty days before December 11, 2009: October 12, 2006.

Edwards and Evelyn served their tort claim notices dated September 28, 2009. Serving a tort claim notice begins a 60-day tolling period for the statute of limitations, during which period they were require

to await the County's response, if any. They filed their complaint on December 11.

Both appellants' disparate treatment claims arose within the three-year-plus-60-day limitations period. Edwards applied for a custody officer position in late 2007 and was denied employment as a custody officer in early 2008. CP 444-46. Evelyn was terminated on June 25, 2009. CP 1055.

Both men filed suit well within the statute of limitations.

(b) Evelyn's HWE Claim Is All Part of One Unified Claim; the Hostile Work Environment Continued Through His Termination in 2009

The County argued below that Evelyn was only permitted to claim that he experienced a hostile work environment, or present evidence of the same, during the three-year statute of limitations period. CP 164-66.

In examining WLAD hostile work environment statute of limitations claims, this Court applies the Supreme Court's analysis of the issue from *Morgan*, 536 U.S. at 115-17. *See Antonius,* 153 Wn.2d at 268. Hostile environment claims are different in kind from discrete acts. *Morgan,* 536 U.S. at 115-17. Their very nature involves repeated conduct, not just a single event. *Id.* The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of

harassment may not be actionable on its own. *Id.*, *see also, Harris,* 510 U.S. at 21. Such claims are based on the cumulative effect of individual acts. *Id.*

Timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. *Id.* Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. *Id.*

Thus, this Court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether *any* act falls within the statutory time period. *Morgan,* 536 U.S. at 115-17.

Evelyn experienced a hostile work environment consistently during the time he worked at the County, but particularly after he became Batties' immediate subordinate. All evidence of that hostile work environment is relevant and not time-barred.

E. CONCLUSION

Racial discrimination can take many forms and come from unlikely sources. It can be complex and subtle, and does not always fit the

simple narrative that many people imagine, particularly people who have not experienced it over the course of many years. The County may scoff at allegations of pervasive race discrimination as "conspiracy theories," but courts should not be so dismissive.

Evelyn, Edwards, and Easterly not only each presented ample independent evidence to defeat summary judgment on their claims individually, but the evidence as a whole paints a stark picture of an institution rife with racial bias, tension, and disparity. Not just Easterly, but all three men, have sustained their burden to take their claims to a jury. Only that jury is empowered to resolve the many-layered factual disputes and complexities each side has presented.

The trial court's summary judgment dismissal should be reversed.

DATED this 14th day of August, 2015.

Respectfully submitted,

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APPENDIX

FILED
2014 DEC 12 AM 10:55
SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

BRITT EASTERLY, ELZY EDWARDS, and CLIFFORD EVELYN,	)	NO. 09-2-05520-7
Plaintiffs,	)	ORDER DECIDING DEFENDANT'S MOTIONS
v.	)	FOR SUMMARY JUDGMENT AND TO STRIKE MATERIALS
CLARK COUNTY,	)	PURSUANT TO CR 12(f)
Defendant.	)	[CLERK'S ACTION REQUIRED]

THIS MATTER came on regularly for hearing before the undersigned judge on September 12, 2014, on the motions of the defendant, Clark County, for summary judgment, and to strike materials filed by the plaintiff in opposition to summary judgment pursuant to CR 12(f). The plaintiffs were represented by and through their attorney, Thomas Boothe. The defendant was represented by and through its attorney, Mitchell Cogen. The court considered the records and files herein, including specifically the following materials:

1) Defendant's motion for summary judgment, filed May 30, 2014;

2) Defendant's memorandum of points and authorities in support of motion for summary judgment, filed May 30, 2014;

Exhibit A, Page 1

3) Declaration of Candy Arata in support of defendant's motion for summary judgment, filed May 30, 2014;

4) Declaration of Kathleen Back in support of defendant's motion for summary judgment, filed May 30, 2014;

5) Declaration of Breanne Nelson in support of defendant's motion for summary judgment, filed May 30, 2014;

6) Declaration of Dennis Pritchard in support of defendant's motion for summary judgment, filed May 30, 2014;

7) Declaration of Francine Reis in support of defendant's motion for summary judgment, filed May 30, 2014;

8) Declaration of Kimberly Beltran in support of defendant's motion for summary judgment, filed May 30, 2014;

9) Declaration of Joseph Dunegan in support of defendant's motion for summary judgment, filed May 30, 2014;

10) Declaration of Lois Hickey in support of defendant's motion for summary judgment, filed May 30, 2014;

11) Declaration of Timothy Hockett in support of defendant's motion for summary judgment, filed May 30, 2014;

12) Declaration of Garry Lucas in support of defendant's motion for summary judgment, filed May 30, 2014;

13) Declaration of Tim McCray in support of defendant's motion for summary judgment, filed May 30, 2014;

14) Declaration of Mitchell J. Cogen in support of defendant's motion for summary judgment, filed May 30, 2014;

15) Plaintiff's Opposition to Clark County's Motion for Summary Judgment, filed August 1, 2014;

16) Declaration of Britt Easterly in support of plaintiffs' opposition to defendant's motion for summary judgment, filed August 1, 2014;

17) Declaration of Clifford Evelyn, filed August 1, 2014;

18) Declaration of Penny Harrington, filed August 1, 2014;

19) Declaration of Gerald Haynes, filed August 1, 2014;

20) Declaration of Pandora Pierce, filed August 1, 2014;

21) Declaration of Heather Sirr, filed August 1, 2014;

22) Declaration of Megan Holley in support of plaintiffs' opposition to Clark County's motion for summary judgment, filed August 1, 2014;

23) Defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

24) Declaration of Mitchell J. Cogen in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

25) Declaration of Candy Arata in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

26) Declaration of Kimberly Beltran in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

27) Declaration of Joseph Dunegan in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

28) Declaration of Timothy A. Hockett in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

29) Declaration of Garry Lucas in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

30) Declaration of Breanne Nelson in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

31) Declaration of Francine Reis in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

32) Declaration of Harold Oaks in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

33) Declaration of Mary Malicki in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

34) Declaration of Jackie Webster in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

35) Declaration of Michael Evans in support of defendant's reply to plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014;

36) Declaration of Julie Higgins, filed August 29, 2014;

37) Declaration of Nancy Reudink, filed August 29, 2014;

38) Declaration of Kelly Epperson, filed August 29, 2014;

39) Defendant's CR 12(f) motions to strike material from plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014; and

40) Plaintiffs' opposition to defendant's CR 12(f) motions to strike materials from plaintiffs' opposition to Clark County's motion for summary judgment, filed September 10, 2014.

The court also considered the formal pleadings filed in this matter, and the oral arguments presented by the parties. The court is full advised in the premises of the motions.

The normal standards for deciding a motion for summary judgment apply. The moving party must demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. All inferences must be resolved in favor of the non-moving party. If reasonable minds might reach different conclusions on the basis of the direct and circumstantial evidence presented, then the issue must be resolved at trial.

The materials presented by the plaintiffs in opposition to the defendant's motion should not be partially stricken, and were fully considered by the court. The plaintiffs have abandoned their claims for intentional infliction of emotional distress and outrage. As to the remaining claims, the defendant has made the requisite showing for summary judgment with regard to two of the plaintiffs. As to plaintiff Britt Easterly, material issues of fact preclude summary judgment. Summary judgment for the defendant is not based on the statute of limitations as to any claim. Now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1) The defendant's CR 12(f) motions to strike material from plaintiffs' opposition to Clark County's motion for summary judgment, filed August 29, 2014, are denied.

2) The defendant's motion for summary judgment of dismissal of the claims of Elzy Edwards, filed May 30, 2014, is granted.

3) The defendant's motion for summary judgment of dismissal of the claims of Clifford Evelyn, filed May 30, 2014, is granted.

4) The defendant's motion for summary judgment of dismissal of the claims of outrage and intentional infliction of emotional distress by Britt Easterly, filed May 30, 2014, is granted.

5) The defendant's motion for summary judgment of dismissal of the WLAD and negligence claims by Britt Easterly, filed May 30, 2014, is denied.

6) This matter is noted for presentation of judgment, consistent with this order, on Friday, January 9, 2015, at 9:00 am, on the Department 9 Civil Motion Docket. The court shall provide a copy of this order, and a copy of the scheduling citation, to counsel of record for all parties.

DATED this 11th day of December, 2014.

Judge Robert A. Lewis

DECLARATION OF SERVICE

On said day below, I emailed and deposited in the U.S. Mail for service a true and accurate copy of the following document: Brief of Appellants in Court of Appeals Cause No. 47305-4-II to the following parties:

Mitchell J. Cogen
Bullard Law
200 SW Market Street, Suite 1900
Portland, OR 97201

Emily Sheldrick
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Thomas S. Boothe
7635 SW Westmoor Way
Portland, OR 97225-2138

Original efiled with:
Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 14th, 2015, at Seattle, Washington.

Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW

August 14, 2015 - 11:37 AM

Transmittal Letter

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Letter

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Petition for Review (PRV)

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TALMADGE FITZPATRICK TRIBE
2775 Harbor Ave. SW | 3rd Floor, Suite C | Seattle, WA 98126 | 206.574.6661 206.575.1397 Fax

August 20, 2015

Court Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4427

Re: *Britt Easterly, et al. v. Clark County*
(Court of Appeals Cause No. 47305-4-II)

Dear Court Clerk:

Enclosed please find corrected page 13 in errata to our Brief of Appellants filed on August 14, 2015 in the above referenced case. We ask that the Court substitute the above listed page. Thank you.

Very truly yours,

Sidney Tribe

Enclosure

cc: Mitchell J. Cogen
Emily Sheldrick
Thomas S. Boothe

asked, "You said that he made a couple of sexual comments to her, and my question is, was one of them to do with being cold, as in you could tell from her breasts that she was cold?" CP 1624. Arata recounted the alleged statement "once you go black" to every single interviewee, seeking corroboration. CP 1731-32. One woman even confirmed having heard the "once you go black" comments, then immediately retracted that confirmation. CP 1728. Arata also repeatedly in interviews referred to the complainants as "victims" of Evelyn, even though she knew that was an improper and inflammatory term. CP 1721.

Arata's suggestive interview tactics yielded results: as the County's summary judgment brief records, most of those interviewed claimed that Evelyn had made virtually identical comments to multiple people on multiple occasions. CP 118-31.

However, the method of investigation, Evelyn's initial criticism of the Wexford employees' work that may have offended them, and Evelyn's long history at the County without such complaints from County employees, raises doubts about the efficacy of Arata's investigation. CP 1721. Evelyn was terminated. CP 1566-67.

DECLARATION OF SERVICE

On said day below, I emailed and deposited in the U.S. Mail for service a true and accurate copy of the following document: Errata Letter to Clerk in Court of Appeals Cause No. 47305-4-II to the following parties:

Mitchell J. Cogen
Bullard Law
200 SW Market Street, Suite 1900
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950 Broadway, Suite 300
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 20th, 2015, at Seattle, Washington.

Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW

August 20, 2015 - 3:23 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 47305-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

■ Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Errata letter to Clerk

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