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Court of Appeals, Division One Case No. 748408

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRITT EASTERLY, ELZY EDWARDS
and CLIFFORD EVELYN,

Respondents,

v.

CLARK COUNTY,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner Clark County ("Clark County" or "the County") asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part II of this petition.

II. CITATION TO COURT OF APPEALS DECISION

Clark County seeks review of the unpublished decision filed on June 13, 2016 by Division One of the Court of Appeals reversing the Superior Court's summary judgment dismissal of Respondent Elzy Edwards' ("Edwards") case. The decision, 194 Wn. App. 1029 (2016), can be found in the Appendix ("App.") at pages 1 through 14. Petitioner timely filed a motion for reconsideration. A copy of the order denying Petitioner's motion for reconsideration can be found in the Appendix at page 15.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in finding that Edwards satisfied the "qualified for the position" element of his prima facie case solely by earning passing scores on initial pre-hire testing where the public policy established by RCW 43.101.021 requires law enforcement personnel to be truthful and honest and Edwards had been dishonest during the application process.

2. Whether the Court of Appeals erred in finding that by following the recommendations of the third-party investigator hired by Clark County to investigate Edwards' complaint about not being hired, evidence of pretext was established sufficient to defeat Clark County's legitimate, non-discriminatory reason for not hiring Edwards.

IV. STATEMENT OF THE CASE

A. Factual Background

Edwards, an African-American, applied for a custody officer position at the Clark County Sheriff's Office ("CCSO") on November 1, 2007. CP 1565. Following successful completion of the initial oral and written testing steps, Edwards submitted a Personal History Statement ("PHS") as part of his background investigation and a background investigator was assigned. CP 372-89. Both the application and the PHS make clear that willful omissions are cause for disqualification from the hiring process of termination of employment if hired. *Id.*

As part of the application, every CCSO applicant must attest and Edwards attested:

> I hereby certify, under the penalty of perjury in the State of Washington, that this application ***contains no willful misrepresentation*** and that ***the information given is true and complete*** to the best of my knowledge and belief. I authorize the investigation of any or all statements contained in this application. I also authorize any person,

> school, current employer, past employers and organizations to provide relevant information and opinions that may be useful in making a hiring decision. I am aware that ***should an investigation at any time disclose any such misrepresentation or falsification, my application may be rejected, my name may be removed from consideration or I may be discharged from my employment.*** CP 1565 (emphasis added).

Further, CCSO's PHS requires all applicants to attest and Edwards attested:

> I hereby certify there are ***no willful misrepresentations, omissions or fabrications*** in the foregoing statements and answers to questions. I am fully aware that ***any such misrepresentations, omissions or falsifications will be grounds for immediate rejection of application and/or termination of employment.*** CP 385 (emphasis added).

Moreover, Civil Service rules provide that the application of any applicant who "[h]as made any material false statement or has attempted any deception or fraud in connection with any civil service examination" will be rejected. CP 1166. Complete truthfulness in the background investigation process is imperative because considerable public trust is placed in law enforcement officers. RCW 43.101.021 provides:

> It is the policy of the state of Washington that all commissioned, appointed and elected law enforcement personnel comply with their oath of office and agency policies regarding the duty to be truthful and honest in the conduct of their official business.

Accordingly, CCSO requires complete honesty in the application process as a condition of hire. CP 37-38, 2218.

The investigator assigned to conduct Edwards' background investigation discovered that Edwards had failed to disclose two prior arrests and three prior convictions. CP 229-30, 362, 364. CCSO considers omissions of arrests and/or convictions to be willful misrepresentations since these are things not likely to be forgotten, particularly by someone who wants to work in law enforcement. CP 38, 225-26, 229-230. Edwards was aware that deliberate omissions from his PHS could result in disqualification from the application process. CP 276.

During his background interview, Edwards was given the opportunity to explain his omission of the arrests and convictions. Edwards conceded that the omitted arrests and convictions were "one of the most demoralizing points in [his] life" and expressed concern that these omissions would disqualify him. CP 229, 231, 286, 395-96, 397-98. Following the interview, Edwards was disqualified from the application process and removed from the eligibility list. CP 232, 248, 362-370.

Edwards appealed his disqualification and removal. CP 69-70. As part of his appeal, Edwards misrepresented to the Civil Service Commission ("CSC") that he had disclosed in his PHS the information about his arrests and convictions that he had, in fact, failed to disclose. CP

95-96, 291-92. The CSC decided to reinstate Edwards to the hiring process "with reservations" based upon the identified background concerns. CP 70, 421. Subsequently, Edwards was invited to participate in a June 24, 2008 panel interview. CP 939. All panel members rated Edwards poorly for numerous reasons, including his background issues, and Edwards was not selected. CP 215, 218.

Edwards appealed again and raised, for the first time, allegations that the decision not to hire him was racially motivated. In response, the County hired an independent, third-party investigator to assess both Edwards' allegations of race discrimination as well as the functioning of the civil service process. CP 1162. The investigator determined that there was no evidence that Edwards's race played any role in the hiring process. CP 447-448,1885. However, the investigator also determined that administrative errors had occurred during the civil service process. Because of these process errors, the investigator recommended that Edwards be given the opportunity to be reinstated to the hiring process at the background investigation step with a different background investigator. CP 1188. Pursuant to the investigator's findings and recommendations, the County offered Edwards reinstatement to the hiring process at the background investigation step and also at the panel interview step which he had previously attained. Edwards rejected both

offers by the County and instead chose to file suit. CP 456.

B. Procedural History

On December 11, 2009, Edwards , Britt Easterly, and Clifford Evelyn sued Clark County in Clark County Superior Court. CP 1-20. All three plaintiffs alleged that they had been discriminated against on the basis of race by CCSO in violation of the WLAD. *Id.* Edwards was a failed applicant for a custody officer position and his claim sounds in failure to hire. CP 6-12.

On May 30, 2014, Clark County moved for summary judgment against all claims of all plaintiffs. CP 186-88. On December 12, 2014, the trial court granted Clark County's motion for summary judgment with respect to Edwards and Evelyn and dismissed their claims. CP 2281-86. Edwards and Evelyn appealed their dismissals to Division Two of the Court of Appeals. CP 2377. On February 25, 2016, their appeals were transferred to Division One of the Court of Appeals.

Division One of the Court of Appeals reversed in part and affirmed in part the trial court's summary judgment dismissals. App. ¶¶1-2. On July 1, 2016, Clark County filed a motion for reconsideration which was denied on August 9, 2016. App. 15.

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V. ARGUMENT

A. This Court Should Grant Review Under RAP 13.4(b)(1)(2) and(4) to Correct the Court of Appeals' Misinterpretation of Required Qualifications for Employment in Law Enforcement.

1. Honesty is a minimum qualification for employment in law enforcement.

This Court has held that to establish a prima facie case of race discrimination under the WLAD, a plaintiff must show that: (1) he is a member of a racial minority; (2) he applied for and was qualified for an available job; (3) he was not offered the position; and (4) after his rejection, the position remained open and the employer continued to seek applicants from other persons with the plaintiff's qualifications. *Hill v. BCTI Income Fund*, 144 Wn. 2d 172, 181, 23 P. 3d 440 (2001). Clark County argued at summary judgment that Edwards failed to establish a prima facie case of race discrimination because he failed to satisfy the second element of his prima facie case, *i.e.* he was not qualified for the position of custody officer at CCSO. CP 134. Citing RCW 43.101.021 and CCSO's requirement for complete honesty during the application process, the County argued that Edwards was not qualified for a custody officer position at CCSO because *inter alia* he was dishonest in the application process and complete honesty and truthfulness is a minimum qualification for a law enforcement position. CP 1182.

The trial court dismissed Edwards' WLAD failure to hire claim. CP 2281-86. On appeal, the Court of Appeals held that:

> Edwards asserted to the trial court (and continues to assert on appeal) that he possessed the minimum qualifications for the custody officer position. ***To support his assertion, Edwards pointed the trial court to the passing scores that he earned on the examinations during the first two stages of the application process. With this evidentiary showing, Edwards both satisfied the requirements of the second element and established a prima facie case of discrimination in the County's hiring practices***. App. 5, ¶38.

In so holding, Division One of the Court of Appeals has: (1) abrogated the express public policy requiring truthfulness and honesty in law enforcement officers embodied in RCW 43.101.021; (2) ignored this Court's precedent regarding the uniqueness of law enforcement employment and the necessity for the public good to have heightened standards of honesty and integrity for law enforcement; and (3) unilaterally modified CCSO's job requirements for the custody officer position in conflict with Division Two of the Court of Appeals.

a. Abrogation of Public Policy

RCW 43.101.021 provides that "[i]t is the policy of the state of Washington that all commissioned, appointed, and elected law enforcement personnel comply with their oath of office and agency policies regarding the duty to be truthful and honest in the conduct of their

official business." Thus, the public policy requiring truthfulness and honesty by all law enforcement personnel is express and unambiguous. By mandating that an applicant for a law enforcement position can establish qualification for that position merely by passing initial oral and written exams administered by the Civil Service Commission, Division One of the Court of Appeals has nullified this express public policy.

Division One of the Court of Appeals' abrogation of the express public policy set forth in RCW 43.101.021 creates an issue of substantial public concern warranting this Court's review.

b. Conflict with this Court's decision.

In finding Edwards qualified for the custody officer position by merely passing the initial oral and written testing administered by the CSC, Division One has effectively and impermissibly substituted its own judgment in hiring over that of CCSO and determined that honesty is not a valid qualification for a position in law enforcement. However, this Court and numerous other courts have held precisely the opposite.

This Court has recognized and reinforced the unique nature of law enforcement employment and the necessary application of higher standards of honesty and integrity to both law enforcement applicants and employees. In fact, honesty is such a core and essential qualification standard in law enforcement that this Court has held that honesty and

truthfulness are essential qualifications not only for law enforcement officers, but for certain law enforcement support staff as well.

In *O'Hartigan v. Dep't of Pers.*, 118 Wn. 2d 111, 122–23, 821 P.2d 44, 50–51 (1991), this Court analyzed the constitutionality of RCW 49.44.120 and its exemption permitting the use of polygraph testing in law enforcement hiring. Plaintiff, an applicant for a word processing position at the Washington State Patrol, refused to undergo a polygraph examination as part of her application process. *Id.* at 115-16. In rejecting plaintiff's constitutional challenge brought forth on privacy grounds, this Court held:

> O'Hartigan's argument belies the importance of her role. The record discloses that, if hired, she would have been privy to highly confidential and extremely sensitive matters, including investigative reports, ongoing narcotics investigations, employee disciplinary records, sergeant and lieutenant examinations, internal affairs investigation reports, and professional standards reports. ***Such information is safeguarded because if it were compromised, this could endanger law enforcement officers or the public safety.***
>
> ***
>
> Under RCW 49.44.120, polygraph testing is generally prohibited as a method of employee screening. However, the statute also specifically provides that this prohibition does not apply to persons making initial employment applications with a law enforcement agency. RCW 49.44.120. ***The Legislature, in other words, has accepted polygraph testing as an employee screening method to be used by law enforcement agencies. The other methods of employee screening protection named by O'Hartigan, such as probationary periods and background checks,***

> ***are, as the State argues, vulnerable to dishonest responses by either an applicant or the applicant's background references and were not deemed adequate by the Legislature.***
>
> ***
>
> We hold polygraph testing is constitutionally acceptable under an analysis which would require employment screening means which are carefully tailored to achieve the State's interest. ***Thus, under Washington statute regulating or limiting the use of polygraph testing in the workplace, it is constitutionally acceptable that initial applicants to law enforcement agencies are exempted.*** *See* RCW 49.44.120. *Id.* at 118-119.(emphasis added).

In finding the statute constitutional on equal protection grounds, this Court opined:

> We therefore proceed to the second question, whether there is a reasonable basis for treating members of the class differently from those outside the class. ***In this regard, we have observed that there is a valid reason for treating law enforcement job applicants differently due to the sensitive information accessible to employees (even nonofficers), and the unique potential dangers inherent to compromised intelligence during ongoing criminal investigations and other law enforcement activities.*** Law enforcement agencies are in an adversarial relationship with the criminal element of society. ***We have already concluded the State Patrol has a legitimate interest in ensuring a high level of trustworthiness and personal integrity among its employees***. Further, we reject the argument that the state Legislature had no rational basis for treating law enforcement agencies more strictly than other state agencies or private employers. ***Law enforcement personnel perform work of a distinct nature. This court has previously observed that the work of law enforcement is of a highly sensitive nature; that agencies must be free from corruption and employ persons of integrity if they***

> ***are to function effectively.*** (citation omitted). *Id.* at 122. (emphasis added).

Similarly, other courts have also supported the well-established maxim that honesty is a minimum qualification for law enforcement employment. In *Guerrero v. California Dep't of Corr. & Rehab.*, 119 F. Supp. 3d 1065 (N.D. Cal. 2015), the federal district court analyzed whether a question in a background investigation of an applicant for a corrections officer position regarding the applicant's prior use of different Social Security numbers position had a disparate impact on Latinos. *Id.* at 1077. The court found:

> In hiring corrections officers, California law requires CDCR to conduct a thorough background investigation to determine that candidates have good moral character. Corrections officers are authorized to carry firearms. And, they are subject to pressure and manipulation from inmates. ***In determining moral character, CDCR evaluates applicants' integrity, honesty, and good judgment, among other qualifications. Integrity, honesty, and good judgment remain important and valid qualifications for corrections officers***. *Id.* at 1070-71 (emphasis added).

See also Hartman v. City of Petaluma, 841 F. Supp. 946, 949–50 (N.D. Cal. 1994)(applicant for police officer position not otherwise qualified for purposes of ADA claim where applicant was dishonest about drug use; "legitimate concern over this specific deception gave the Department sufficient grounds to reject plaintiff's application."); *Winchester v. City of Hopkinsville*, 93 F. Supp. 3d 752, 768 (W.D. Ky. 2015)(plaintiff failed to

establish prima facie requirement that he was qualified to be police crime scene technician due to dishonesty in application); *Bostic v. Wall*, 588 F.Supp. 994, 999 (W.D. N.C. 1984), aff'd 762 F.2d 997 (4th Cir. 1985)(deputy sheriff's misrepresentations were legitimate, non-discriminatory reason for lack of retention integrity, honesty, and a concerted effort in one's duties are legitimate qualifications to demand of any employee in any position).

Division One of the Court of Appeals' opinion holding that truthfulness and honesty is not a valid and/or required minimum qualification to become a member of law enforcement is in conflict with this Court's opinion in *O'Hartigan* and warrants this Court's review.

c. Conflict with opinion of Division Two of the Court of Appeals

In its decision in this case, Division One of the Court of Appeals has determined that only mere passage of the CSC's initial oral and written testing is required to establish qualification for a law enforcement position at CCSO, eliminating CCSO's requirement that all applicants must be truthful and honest in the application process. However, in a disability discrimination case involving a corrections officer at the Washington Department of Corrections, Division Two of the Court of Appeals held that it was not a proper function for the court to

unilaterally alter the Department of Corrections' job requirements for correctional officers. *Dedman v. Washington Pers. Appeals Bd.*, 98 Wash. App. 471, 480, 989 P.2d 1214, 1219 (1999).

Division One of the Court of Appeals' opinion in this case is in conflict with Division Two of the Court of Appeals' opinion in *Dedman* and warrants this Court's review.

B. This Court Should Grant Review Under RAP 13.4(b)(4) to Correct the Court of Appeals' Diminution of the State's Dominant Public Policy Against Discrimination in Employment.

1. The Washington Law Against Discrimination ("WLAD") contains a public policy mandate to both eradicate and deter discrimination in the workplace.

The WLAD, RCW 49.60 *et seq*, embodies the finding of the legislature that discrimination in employment is a matter of state concern that threatens not only the rights and proper privileges of the inhabitants of the state but also menaces the institutions and foundation of a free democratic state. Accordingly, the WLAD makes it unlawful for an employer to refuse to hire an applicant or discharge or discriminate against an employee with respect to terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog

guide or service animal by a person with a disability, RCW 49.60.180, and declares the right to be free of discrimination as a civil right. RCW 49.60.030. Further, the WLAD established the Washington State Human Rights Commission to "receive, impartially investigate, and pass upon complaints alleging unfair practices" and issue results of such investigations that "will tend to promote good will and minimize or eliminate discrimination..." RCW 49.60.120(4)(5).

It is well-settled that the WLAD sets forth an explicit, well-defined, and dominant public policy. *Int'l Union of Operating Engineers, Local 286 v. Port of Seattle*, 176 Wn. 2d 712, 721–22, 295 P.3d 736, 740–41 (2013). This Court has held that the WLAD contains a "clear mandate to eliminate all forms of discrimination" and that the "purpose of the law is 'to deter and to eradicate discrimination in Washington.' " *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359–60, 20 P.3d 921 (2001) (quoting *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996)). Moreover, this Court has repeatedly held that the WLAD expresses a "public policy of the 'highest priority'." *Antonius v. King County*, 153 Wn.2d 256, 267–68, 103 P.3d 729 (2004) (quoting *Xieng v. Peoples Nat'l Bank of Wash.*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993); accord *Marquis*, 130 Wn.2d at 109, 922 P.2d 43.

2. The Court of Appeals' decision conflicts with the WLAD's clear public policy and threatens the mandate of the WLAD.

In response to Edwards' complaint about not being hired, the County promptly hired an independent, third-party investigator. In doing so, the County acted in conformance with and in support of the WLAD's mandate to deter and eradicate discrimination. *Brown, supra*, 143 Wn. 2d at 359-60. This Court has held that:

> "[a]ntidiscrimination laws create an ***affirmative duty for employers to prevent racial harassment in the workplace by sufficiently disciplining those that engage in harassing behavior***. While the laws do not, and cannot, set standards as to the specific amount of discipline that is required for specific acts or patterns of harassment, the affirmative duty to sufficiently discipline harassers is well defined. Therefore, ***the laws against workplace discrimination and harassment express an explicit, well-defined, and dominant public policy aimed at both ending current discrimination and preventing future discrimination***." *Int'l Union of Operating Engineers, Local 286, supra,* 176 Wn. 2d at 721–22 (emphasis added). *see also Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 793–94, 98 P.3d 1264 (2004); *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir.1991).

It is axiomatic that in order to be able to discipline those engaging in conduct in violation of the WLAD, it must first be determined who the alleged wrongdoer is as well as the factual detail underlying the complaint. In accord with its legislative mandate, the Washington State Human Rights Commission first investigates allegations of WLAD

violations in furtherance of its mission to eradicate discrimination. RCW 49.60.120(4)(5) (http://www.hum.wa.gov/employment). Similarly, the federal EEOC investigates complaints made alleging Title VII violations (https://www.eeoc.gov/employees/process). Moreover, the EEOC's enforcement guidance to employers provides that an employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment (https://www.eeoc.gov/policy/docs/harassment).

Under this legislative and regulatory framework, prudent employers in Washington promptly and thoroughly investigate discrimination complaints since doing so reinforces the WLAD's purpose and mandate. Here, the County promptly hired a third-party investigator to investigate Edwards's complaint. The investigator found no evidence of racial bias or animus in the hiring process. However, some administrative errors were identified and the investigator recommended giving Edwards another chance in the hiring process in light of these procedural errors. CP 1188. Accordingly, Clark County followed the investigator's recommendation. CP 456. In finding that evidence of pretext was created because Clark County followed the recommendation of the investigator, the Court of Appeals acted in derogation of the public policy inherent in the WLAD and created a disincentive for employers to investigate complaints of discrimination.

The Court of Appeals held that because the County followed the investigator's recommendation, evidence of pretext exists such that a reasonable juror could find that the County "would not make such an offer to an applicant whom the employer truly believed lacked the minimum qualifications for the position." App. 6, ¶42. However, such reasoning places the County in an impossible conundrum—a classic "catch-22." Had the County chosen not to investigate Edwards's complaint at all or had it ignored the investigator's recommendation, such conduct would be in contravention of the clear public policy designed to eliminate current and future discrimination. Yet by acting pursuant to the mandate of the WLAD, the Court of Appeals incomprehensibly found that the County's conduct created evidence that Edwards' non-hire was a pretext for discrimination.

Moreover, the Court of Appeals' decision held the County to an impossible standard wherein there is apparently nothing the County could have done in response to Edwards' complaint that would be satisfactory. This is so because had the County not investigated, Edwards likely would have alleged that the County improperly ignored his complaint and that doing so was evidence of race discrimination. Had the County investigated but ignored the investigator's recommendation that Edwards be offered reinstatement to the hiring process—the action

apparently supported by the Court of Appeals—Edwards likely would have alleged that the County ignored its own investigator and that doing so was evidence of race discrimination.

Here, by finding that a jury question was created when the County followed the investigator's recommendation, the Court of Appeals has constructed a legal framework that improperly dissuades employers from investigating complaints of discrimination in stark contrast to the express public policy of the State. When a complaint of discrimination is made, employers rightfully are concerned that legal action against the employer may arise therefrom. If an employer's decision to investigate that complaint brings with it the potential that the investigation itself may cause greater potential legal jeopardy for the employer, a strong disincentive to investigate exists. Moreover, if the decision to investigate will necessarily place the employer in an untenable "catch-22" about remedial action in response to the complaint regardless of the results and/or recommendations from the investigation, an even stronger disincentive to investigate exists.

In this case, the Division One of the Court of Appeals has created a legal disincentive for employers to investigate complaints of discrimination. This Court should accept review to restore the proper

purpose and policy behind the WLAD to require employers to investigate and prompt remedy discrimination or harassment in the workplace.

VI. CONCLUSION

As set forth herein, this Court should accept review of the decision of Division One of the Court of Appeals in this case because that decision is in conflict with the public policies embodied in RCW 43.101.021 and the WLAD and issues of substantial public interest exist. Furthermore, Division One of the Court of Appeals' decision here is in conflict with both this Court's decision as well as a decision by Division Two of the Court of Appeals. Petitioner Clark County respectfully requests that this Court grant review pursuant to RAP 13.4(b)(1)(2) and (4).

RESPECTFULLY SUBMITTED this 8th day of September, 2016.

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APPENDIX

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194 Wash.App. 1029

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

Britt Easterly, Plaintiff,
Elzy Edwards and Clifford Evelyn, Appellants,
v.
Clark County, a municipal corporation; Clark County Sheriff's Office, a department of Clark County, Respondent.

No. 74840-8-I
|
FILED: June 13, 2016

Appeal from Clark Superior Court, No. 09-2-05520-7, Honorable Robert A. Lewis.

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UNPUBLISHED OPINION

Dwyer, J.

*1 ¶ 1 Elzy Edwards, a person of color,[1] applied to be a custody officer at the Clark County Sheriff's Office (the County) in 2007. After not being hired by the County, Edwards filed suit, claiming, in pertinent part, that the County, in its hiring practices, had discriminated against him on the basis of his race. The trial court granted summary judgment, dismissing Edwards' claim. Because unresolved material questions of fact exist as to whether Edwards' race was a substantial factor motivating the County's decision not to hire him, we reverse the trial court's summary dismissal of this claim.

¶ 2 Clifford Evelyn, a person of color, was a long-time employee with the County. After being terminated in 2009, Evelyn filed suit, claiming, in pertinent part, that the County had subjected him to a hostile work environment on the basis of his race and had treated him disparately on the basis of his race. The trial court granted summary judgment, dismissing both of Evelyn's claims. We agree that no reasonable jury could find in Evelyn's favor on his disparate treatment claim and, thus, affirm the summary dismissal of this claim. However, because unresolved material questions of fact exist as to whether Evelyn was subjected to a hostile work environment on the basis of his race, we reverse the trial court's summary dismissal of this claim.[2]

I

¶ 3 On November 1, 2007, Elzy Edwards applied to work as a custody officer with the Clark County Sheriff's Office.

¶ 4 In Clark County, after filing an application, a custody officer applicant proceeds through a multi-stage process consisting of: (1) a written examination and physical agility test, (2) an oral board interview, (3) submission of a Personal History Statement (PHS),[3] (4) a background investigation (which includes an interview), (5) a "Rule of Three" panel interview,[4] (6) and, if selected by a "Rule of Three" panel,[5] referral to the Sheriff, who makes all hiring decisions.

¶ 5 Edwards proceeded through the application process. On November 16, Kathie Back, the County's chief civil service examiner, sent Edwards a letter. Therein, Back informed Edwards of the results of the first two stages of the application process.

> As a result of your successful interview for Custody Officer, your name has been merged onto the existing Custody Officer list of eligible candidates—according to final scores.[6] Therefore, your scores and rank are as follows:

*2 Written Exam (40%) 78

Oral Board Interview Score (60%)	95[7]
Final Rank Score	88
Eligibility List Rank	12

....

> The top five to ten candidates will be contacted in the near future to schedule the one-on-one background interview. All other candidates will be contacted as openings occur according to the list rank.

¶ 6 On November 28, Edwards submitted a PHS to Lois Hickey, a County human resources assistant. Thereafter, Hickey assigned sheriff's detective Timothy Hockett to be Edwards' background investigator. She forwarded Edwards' application and PHS to Hockett.

¶ 7 Upon receiving these documents, Hockett "undertook [his] usual process of reviewing Mr. Edwards[']' application and PHS for completeness and accuracy and checked, among other things, Mr. Edwards' references, criminal history, and financial history." Edwards' application file contained at least one document that identified Edwards' race. Following this review, Hockett discovered that Edwards had failed to disclose two arrests and three misdemeanor charges[8] on his PHS.[9]

¶ 8 Thereafter, Hockett telephoned Edwards to schedule his background interview. Following this conversation, Edwards' interview was scheduled for January 21, 2008. This date was Martin Luther King, Jr. Day. No other interviews were scheduled on this day.[10]

¶ 9 Edwards' interview was held as scheduled. During that interview, Hockett questioned Edwards at length regarding the information that he had attested to on his PHS.

¶ 10 Later that day, Edwards telephoned Back in order to express concern about Hockett's conduct during the interview.[11] The County had received other complaints concerning Hockett's conduct during interviews. These complaints were from Caucasian applicants.

¶ 11 Following Edwards' interview, Hockett wrote a detailed report, which he gave to Hickey. Therein, Hockett concluded that "Mr. Edwards's Personal History Statement (PHS) was incomplete and not accurate. Mr. Edwards is not a suitable candidate for the Custody Officer position." Ultimately, Hockett recommended that Edwards be removed from the eligibility list for the custody officer position.

¶ 12 Thereafter, Arata and Back listened to an audio recording of Edwards' interview. Both later opined that the manner in which Hockett questioned Edwards was similar in kind to a criminal investigation interview rather than an employment investigation interview. Because other applicants had also complained about Hockett's conduct during their background interviews, Arata determined that Hockett should not continue conducting such interviews. Back then requested that a new investigator be assigned to Edwards' application. This never occurred. However, a new investigator was assigned to applicant Chris Settell, who was one of the Caucasian applicants that had complained about Hockett's conduct. Settell was later hired by the County.

*3 ¶ 13 Throughout the month of February, Edwards telephoned Back many times.[12]

¶ 4 On February 28, Back sent Edwards a certified letter,[13] informing him that he was being removed from the eligibility list for the custody officer position and that his removal was due, in part, to the omissions that he had made on his PHS.[14] In this letter, Back also informed Edwards of his right to appeal the County's decision to the Civil Service Commission (the Commission).

¶ 15 On March 4, Edwards wrote to Back, requesting an appeal to the Commission.

¶ 16 On April 10, Edwards appeared before the Commission.

¶ 17 On April 24, Back wrote Edwards, notifying him that the Commission had reviewed his background investigation. Back informed Edwards that his "background was certified (approved) with reservations. Reservations are based on [the] concerns expressed previously."

¶ 18 Throughout the month of May, Edwards telephoned Back many times.[14]

¶ 19 After receiving a telephone call from Back, Breanne Nelson, a County human resources representative, invited Edwards to the next "Rule of Three" panel interview, which was scheduled for June 24. On that day, the panel was comprised of Commander Kimberly Beltran, Sergeant Robert Tuggle, and Officer Tim McCray. Nelson served as moderator. The panel was considering five applicants for three open positions.

¶ 20 Following the interviews, the panelists considered the applicants for each open position. After filling the first two positions, the panelists could not come to a consensus on the third, for which it was considering Edwards. Ultimately, Beltran and McCray concluded that Edwards was a sufficiently qualified candidate, while Tuggle concluded that he was not. Nelson asserts that, "[a]t no point during the Rule of Three process was any candidate's race ever mentioned."

¶ 21 The next day, Nelson brought the Rule of Three panel's failure to reach a consensus on the third open position to the attention of Undersheriff Joe Dunegan. Following a discussion with Nelson, Dunegan concluded that Edwards should not be selected based on the concerns that were identified during Edwards' background investigation. Dunegan then requested both that Nelson draft a memorandum detailing his decision and inform Edwards of the County's decision. Nelson complied with these requests.

*4 ¶ 22 On July 3, Edwards wrote a letter to Rekah Strong, the County's diversity coordinator. Therein, once again, he expressed concern about the manner in which his application process was conducted. Thereafter, the County conducted an investigation.

¶ 23 As part of this investigation, the County hired an independent investigator, attorney Jill Goldsmith, to evaluate Edwards' concerns. Following this investigation, Goldsmith concluded that there were several procedural irregularities in the manner in which the County conducted Edwards' application process. As a result of these irregularities, Goldsmith recommended that Edwards be reinstated to the application process.[15]

¶ 24 On February 12, 2009, Francine Reis, the County's human resources director, wrote Edwards offering to reinstate him to the application process. Reis initially offered to reinstate Edwards to the background investigation stage of the application process. After Edwards expressed reservations, Reis then offered to reinstate him to the "Rule of Three" stage. Ultimately, Edwards, who had recently been hired by the Washington State Department of Corrections, declined the offer.

¶ 25 On December 11, Edwards filed suit. Therein, he alleged that the County had engaged in unlawful race discrimination in violation of RCW 49.60.180 in connection with his application for the custody officer position. Edwards' allegation of race discrimination was based on the following evidence: (1) that Edwards' interview was the only interview that was scheduled on January 21, 2008—Martin Luther King, Jr. Day, (2) that prior to Edwards' background interview, Hockett had reviewed Edwards' application file, which contained at least one document that identified Edwards' race, (3) that Hockett had subjected Edwards to an unusually rigorous and long background interview, (4) that Chris Settell, a Caucasian custody officer applicant, was assigned a new investigator and later hired by the County, while Edwards was not, and (5) that Nelson had, prior to Edwards' panel interview, notified the "Rule of Three" panel about his removal and reinstatement to the eligibility list.[16] Edwards argued that these actions, taken together, supported an inference that Edwards' race was a substantial motivating factor in the County's decision not to hire him.

*5 ¶ 26 On May 30, 2014, the County moved for summary judgment on Edwards' claim. In so moving, the County countered Edwards' claim of race discrimination with the following evidence: (1) Hockett did not realize that January 21 was Martin Luther King, Jr. Day until the morning of Edwards' interview, (2) background interviews had been conducted on various holidays over the years upon mutual agreement of the applicant and the interviewer, (3) Hockett was not aware of Edwards' race until they met on the morning of the interview, both because Hockett maintained that an applicant's race was "not something that [he] was interested in" and because Hockett believed that "race as specified in such reports [in an applicant's file] is notoriously inaccurate and unreliable," (4) Hockett sets aside four hour windows for all of the background interviews that he conducts, (5) Edwards' interview was longer than usual both because of

the number of issues concerning Edwards' background that were raised by Hockett's investigation and because of Edwards' evasiveness during the interview;" (6) there were significant differences between Edwards' and Settell's background that justified their varying treatment, including that, unlike Edwards, Settell had no criminal history and had not omitted any arrests or convictions from his PHS, (7) Nelson's assertion that, "[a]t no point in time during our discussion did Undersheriff Dunegan ask nor did [she] mention Edwards' race or the race of any applicant," and (8) Undersheriff Dunegan's statement that at the time that he made his decision not to hire Edwards, "Nelson did not tell [him] the race of any applicant nor did [he] ask."

¶ 27 The County also presented statistical evidence concerning the 34 interviews that Hockett had performed during his tenure as a background investigator (from January 1, 2007 to March 1, 2008). These statistics indicated that of those 34 applicants, 21 were Caucasian (61.7 percent), five were Hispanic (14.7 percent), three were Black (8.8 percent), three were Asian (8.8 percent) and two were of unknown race (5.8 percent). Hockett passed only 5 of the 34 applicants through the background interview stage – an overall pass rate of 14.7 percent. Of the five who passed, one was Black, two were Hispanic, and two were Caucasian (one Caucasian was passed "with reservations"). Overall, 38 percent of Hockett's investigations were performed on non-Caucasians, but 60 percent of Hockett's passing evaluations were given to non-Caucasians.

¶ 28 The trial court granted summary judgment in favor of the County, dismissing Edwards' claim.

¶ 29 Edwards now appeals.

II

¶ 30 Edwards contends that the trial court improperly granted summary dismissal of his claim of discrimination in the County's hiring practices. This is so, he asserts, because there exist unresolved material questions of fact as to whether his race was a substantial factor motivating the County's decision not to hire him. We agree.

¶ 31 We review a trial court's grant of summary judgment de novo. Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Camicia, 179 Wn.2d at 693. When making this determination, we consider all the facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

¶ 32 Under Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW, it is an unfair practice for an employer to refuse to hire any person on the basis of a protected characteristic, including race. RCW 49.60.180(1). "At trial, the WLAD plaintiff must ultimately prove that [the protected characteristic] was a 'substantial factor' in an employer's adverse employment action." Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014). A "substantial factor" means that the protected characteristic was a significant motivating factor bringing about the employer's decision, not that the protected characteristic was the sole factor in the decision. Scrivener, 181 Wn.2d at 444.

*6 ¶ 33 "[S]ummary judgment to an employer is seldom appropriate in the WLAD cases." Scrivener, 181 Wn.2d at 445. To overcome summary judgment, a plaintiff needs to show only "that a *reasonable jury could find* that the plaintiff's protected trait was a substantial factor motivating the employer's adverse actions." Scrivener, 181 Wn.2d at 445 (emphasis added). "This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence." Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 149, 94 P.3d 930 (2004).

¶ 34 Where a WLAD plaintiff lacks direct evidence of discrimination, the burden-shifting analysis articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973), is used to determine the proper order and nature of proof on summary judgment.[5]

> Under the first prong of the McDonnell Douglas framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination, which creates a presumption of discrimination.[6] Riehl, 152 Wn.2d at 149-50; Kastanis v. Educ. Emps. Credit Union, 122 Wn.2d 483, 490, 859 P.2d 26, 865 P.2d 507 (1993). Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988).
>
> "If the Defendant meets this burden, the third prong of the McDonnell Douglas test requires the Plaintiff to produce sufficient evidence that Defendant's alleged nondiscriminatory reason for [the employment action] was a pretext." Hummel v. Am. Disposal Co., 124

Wn.2d [656,] 667[, 880 P.2d 988 (1994)]. Evidence is sufficient to overcome summary judgment if it creates a genuine issue of material fact that the employer's articulated reason was a pretext for a discriminatory purpose. Id. at 668; Grimwood, 110 Wn.2d at 364; Riehl, 152 Wn.2d at 150.

....

... An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer. Fell v. Spokane Transit Auth., 128 Wn.2d 618, 643 n.32, 911 P.2d 1319 (1996); see Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wn.2d 46, 73, 821 P.2d 18 (1991); Grimwood, 110 Wn.2d at 365.

An employee does not *need* to disprove each of the employer's articulated reasons to satisfy the pretext burden of production. Our case law clearly establishes that it is the plaintiff's burden at trial to prove that discrimination was a substantial factor in an adverse employment action, not the only motivating factor. See Mackay[v. Acorn Custom Cabinetry, Inc.], 127 Wn.2d [302,] 309–11 [, 898 P.2d 284 (1995)]. An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable under the WLAD. See Id.

Scrivener, 181 Wn.2d at 446–47.

*7 ¶ 35 "If the plaintiff satisfies the McDonnell Douglas burden of production requirements, the case proceeds to trial, unless the judge determines that no rational fact finder could conclude that the action was discriminatory." Scrivener, 181 Wn.2d at 446.

At the summary judgment stage, a plaintiff's prima facie burden is "not onerous." [Texas Dep't of Cmty. Affairs v.]Burdine, 450 U.S. [248,] 253 [, 101 S. Ct. 1089, 67 L.Ed. 2d 207 (1981)]; see also Johnson[v. Dep't of Soc. & Health Servs.], 80 Wn. App. [212,] 227 n.21 [,907 P.2d 1223 (1996)]. The "requisite degree of proof necessary to establish a prima facie case ... is *minimal* and does not even need to rise to the level of a preponderance of the evidence." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994) (emphasis added and omitted).

Fulton v. Dep't of Soc. & Health Servs., 169 Wn. App. 137, 152, 279 P.3d 500 (2012).

¶ 36 To establish a prima facie case of race discrimination in an employer's hiring practices, the plaintiff must show (1) that he or she belongs to a protected class, (2) that he or she applied and was qualified for a job for which the employer was seeking applications, (3) that despite his or her qualifications, he or she was rejected, and (4) that after his or her rejection, the position remained open and the employer continued to seek applications from other persons with comparable qualifications." McDonnell Douglas, 411 U.S. at 802.

¶ 37 There is no real dispute that Edwards met his burden with respect to the first, third, and fourth elements of his prima facie case. As to the second element, that Edwards was qualified for the job that he was seeking, our focus is on whether Edwards put forth sufficient evidence from which a reasonable jury could find either that he possessed the minimum qualifications for the position or that his qualifications were comparable to those of the person who was awarded the position. Lyons v. England, 307 F.3d 1092, 1113–14 (9th Cir. 2002).

¶ 38 Edwards asserted to the trial court (and continues to assert on appeal) that he possessed the minimum qualifications for the custody officer position. To support this assertion, Edwards pointed the trial court to the passing scores that he earned on the examinations during the first two stages of the application process. With this evidentiary showing, Edwards both satisfied the requirements of the second element and established a prima facie case of discrimination in the County's hiring practices.

¶ 39 Thus, the burden of production shifts to the County to articulate a legitimate, nondiscriminatory reason for declining to hire Edwards. " '[T]he employer's burden is satisfied if he simply explains what he has done or produc[es] evidence of legitimate nondiscriminatory reasons.' " Burdine, 450 U.S. at 256 (internal quotation marks omitted) (quoting Bd. of Trustees of Keene State Coll. v. Sweeny, 439 U.S. 24, 25 n.2, 99 S. Ct. 295, 58 L.Ed. 2d 216 (1978)). The County asserted to the trial court (and continues to assert on appeal) that it had a legitimate nondiscriminatory reason not to hire Edwards because he lacked the requisite honesty and integrity to be a custody officer. To support this assertion, the County pointed the trial court to the fact that Edwards failed to disclose the two arrests and three misdemeanor charges on his PHS. With this evidentiary showing, the County satisfied its burden of production to articulate a legitimate, nondiscriminatory reason for declining to hire Edwards.

*8 ¶ 40 Because the County articulated legitimate reasons for its actions, the burden of production shifts back to

Edwards to offer sufficient evidence either that the County's proffered nondiscriminatory reason was pretextual or that, notwithstanding the County's proffered reason, Edwards' race was a substantial factor motivating the County's decision not to hire him. See Scrivener, 181 Wn.2d at 446–47; see also Burdine, 450 U.S. at 256 (a plaintiff may establish pretext "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").

¶ 41 Edwards presented such evidence

¶ 42 In response to the County's proffered reason (that he was unqualified by reason of dishonesty for the custody officer position), Edwards pointed to evidence that the County twice offered to reinstate him to the custody officer selection process. Viewing this evidence in the light most favorable to Edwards, a reasonable jury could infer that an employer would not make such an offer to an applicant whom the employer truly believed lacked the minimum qualifications for the position." This is evidence that the County's proffered reason was pretextual.[8]

¶ 43 Edwards also presented circumstantial evidence that his race may have been a substantial factor motivating the County's decision not to hire him by pointing to evidence that his interview was the only one that was scheduled on Martin Luther King, Jr. Day, that Hockett had access to at least one document in Edwards' application file that identified Edwards' race, and that a Caucasian applicant who was later hired by the County was assigned a new investigator after complaining about Hockett's conduct, while Edwards was not.

¶ 44 In response, the County presented evidence that Edwards' race was not a substantial factor motivating its hiring decision by demonstrating that 20 percent of the applicants to whom Hockett gave passing evaluations to were Black and that, in total, 60 percent of the applicants to whom he gave passing evaluations were non-Caucasian.

¶ 45 Taken together, the evidence presented by Edwards and the County raise competing inferences from which a reasonable jury could infer either discriminatory or nondiscriminatory intent. These competing inferences, in turn, create a genuine issue of material fact concerning whether Edwards' race was a substantial factor motivating the County's decision not to hire him. "When the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation." Scrivener, 181 Wn.2d at 445. Because jury questions are presented, summary dismissal was improperly granted. That order is reversed.

III

¶ 46 Clifford Evelyn was hired as a custody officer by the County on July 17, 1989. During Evelyn's tenure, he received several promotions, eventually assuming the rank of commander. As a commander, Evelyn reported to Chief Deputy Jackie Batties. Batties and Evelyn are of the same race.

*9 ¶ 47 At some point prior to May 7, 2008, Evelyn was having lunch with Chief Batties and Commander Kimberly Beltran, a Caucasian, at a restaurant near their workplace. The three were engaged in conversation when Chief Batties stated, "[w]ell, you know, I have a problem with black men that date white women." Evelyn was dating a Caucasian woman at the time. Chief Batties was aware of this fact. Chief Batties later admitted to making this remark and stated that she apologized for doing so.[9]

¶ 48 On appeal, Evelyn avers that Batties' remark is "direct evidence of racially biased attitudes toward [him], which is the wellspring from which all of the other hostility emanated."[10] Br. of Appellant at 38. In this regard, the evidence supporting Evelyn's hostile work environment claim is based on numerous acts that he alleges took place over the course of his employment. Thus, his argument goes, these acts—when viewed in light of Chief Batties' remark and considering the totality of the circumstances—can be causally linked to support his hostile work environment claim.[11] The acts upon which he relies are:

> (1) Evelyn's assertion that inmates would call him "nigger" in front of Caucasian commanders, who would laugh and not correct the inmates.
>
> (2) On October 4, 2005, Evelyn wrote Chief Batties an e-mail. Therein, he expressed concern that a Caucasian colleague, Commander Nikki Costa, was not appropriately documenting her vacation time. He followed up this e-mail with a letter on October 9. Therein, he reiterated his concerns about Commander Costa.
>
> In his complaint, Evelyn averred that "Chief Jackie Batties did not forward the complaint for

investigation and consideration by Internal Affairs. Instead, the investigation was dismissed by the Undersheriff Joe Dunegan. The result was a written directive redefining the procedure to document time off."

(3) In 2007, the County entered into a contract with Wexford Health Sources, Inc., who was hired to provide medical services to inmates. In his complaint, Evelyn averred that he had "expressed concerns about Wexford's performance under the contract and about how its failures of performance were endangering inmates and jail staff" but that the issues about which he expressed concern "continued unabated."

(4) On January 3, 2008, Evelyn's colleague, Britt Easterly, found two pictures one posted in the jail classification office and another posted on the outside of the transport door that was near the jail classification office---that depicted a dark-skinned male wearing a feathered head ornament and a grass skirt. A caption, written in ink below the pictures, stated, "871 on vacation." 3871 was Easterly's badge number.

(5) On February 5, Evelyn tripped while exiting an elevator and fell onto a passerby, Sandi Vosberg.[7] He grabbed onto Vosberg's shoulders in an effort to prevent himself from falling. Thereafter, Vosberg filed a complaint of unwanted touching against Evelyn. On February 13, the County exonerated Evelyn of any wrongdoing.

In his complaint, Evelyn averred that on this occasion:

> "Chief Batties signed off on [ ] Vosburg's [sic] complaint and forwarded it to Internal Affairs without informing [ ] Evelyn of the allegations, thus denying [ ] Evelyn the opportunity to verify or contradict the reported events. This action by Chief Batties was contrary to her routine practice with regard to other commanders."

*10 (6) On February 27, Evelyn sent an e-mail to a fellow employee regarding the liability associated with a staff member of the employee who had lost a sheriff's office identification badge. Thereafter, Evelyn notified the corrections manager, Pam Clark, of his correspondence with the employee. On March 4, Batties came to Evelyn's office to speak with him about his e-mail correspondence

In his complaint, Evelyn averred that on this occasion:

> "Chief Batties abrasively confronted [ ] Evelyn in his office about the e-mail exchange between him and Ms. Clark. Without permitting [ ] Evelyn to respond to what had occurred, she told [ ] Evelyn that his emails to Ms. Clark were inappropriate. While doing so, Chief Batties raised her voice while the door to [ ] Evelyn's office was open and within earshot of support staff. Chief Batties then isolated [ ] Evelyn with differential treatment for appropriately two weeks by, among other actions, personally addressing other staff members and commanders, but saying nothing to [ ] Evelyn and refusing to make eye contact with him."

(7) On March 6, Evelyn sent an e-mail to Batties. Therein, Evelyn expressed that he was uncomfortable with how Batties had handled a situation between his colleague, Custody Officer Lamar Elliott, a person of color, and Commander Mike Anderson, a Caucasian. Elliott had requested permission from Anderson to wear his uniform while off-duty to serve breakfast at a school function for his child. Anderson denied Elliott's request. In doing so, Anderson allegedly made a remark to Elliott that it would be embarrassing if he got egg on his shirt.

On March 11, Chief Batties wrote Evelyn a letter. Therein, she set forth her expectation that, among other things, Evelyn no longer engage in "angry E-mail, finger pointing." Ultimately, Chief Batties notified Evelyn that he should "[c]onsider this a corrective counseling and if it happens again, I will give you an oral reprimand."

(8) On September 25, Andrea Arnason,[8] a Wexford employee, submitted a complaint against Evelyn. Therein, Arnason asserted, among other things, that Evelyn had made "lewd, inappropriate, and discriminatory" remarks toward her. Candy Arata, the County's human resources Manager, conducted

an investigation into these allegations.
In his complaint, Evelyn asserted that the evidence obtained from the County's investigation into these allegations was the product of "several biased interviews."[9]

*11 ¶ 49 The last act on this list, the allegedly biased sexual harassment investigation, resulted in Evelyn's termination on June 25, 2009. Prior to terminating Evelyn's employment, the County offered him the opportunity to voluntarily separate from service via a retirement agreement. Evelyn declined the offer.

¶ 59 On December 11, Evelyn filed suit. Therein, he alleged that the County had subjected him to both a hostile work environment and disparate treatment on the basis of his race, in violation of RCW 49.60.180.

¶ 51 In asserting his hostile work environment claim, Evelyn pointed the trial court to Batties' remark about interracial dating and the numerous aforementioned acts of alleged hostility.

¶ 52 Evelyn also presented testimony from Penny Harrington, who testified as an expert witness "with regard to policies and practices in paramilitary organizations such as police and fire departments." Harrington reviewed the County's investigation into the sexual harassment allegations against Evelyn and opined that "this investigation became more of a witch hunt than the neutral investigation it should have been." Harrington placed particular focus on Arata, who she opined had "tainted the investigation." Harrington elaborated, stating that, among other things, Arata "asked leading questions of the witnesses,"[10] "frequently interrupted the people she was interviewing, thereby not getting their complete statements,"[11] repeated or rephrased questions without being asked to do so by a witness, and "repeatedly did share" the testimony that she obtained from previous witnesses with future witnesses."[12]

¶ 53 Finally, Evelyn presented his own testimony, and that of his colleagues, Britt Easterly and Gerald Haynes,[13] who spoke to their beliefs regarding how the County treated them during the course of their employment. Evelyn asserted his belief that Batties and Undersheriff Dunegan would approve "another commander's proposal, which was essentially what I had proposed before but had seen shot down by Jackie." Ultimately, Evelyn opined that he "felt targeted" both by "how Jackie Batties handled matters involving [him]" and by "how the investigation against [him] for sexual harassment was handled." Easterly testified that, "African American officers were not held as examples or given the opportunity that others were given." Easterly elaborated, stating that, "I saw retribution from staff members when I asserted myself or my opinions. I was often labeled a bully, yet when white officers behaved in the same manner and within the guidelines set forth by the County, they were touted as innovative or promotable." Consistent with Easterly's testimony, Haynes attested that, "I learned, and I knew others too believe, that you had to keep quiet and not make waves if you wanted to survive in the department." Concerning Evelyn in particular, Haynes testified that, "I saw Evelyn trying to do something about the situation we African–American custody officers were doing. I also saw him work hard to try to make sure the inmates were properly provided for." Ultimately, Haynes opined that Evelyn "was targeted" for these actions.

*12 ¶ 54 In asserting his disparate treatment claim, Evelyn pointed the trial court to a comparator, Commander Don Polan, who was a Caucasian employee about whom the County had received similar harassment complaints. In doing so, Evelyn averred that the County allowed Polan to resign in lieu of termination.

¶ 55 On May 30, 2014, the County moved for summary judgment on Evelyn's claims. In so moving, the County countered both of Evelyn's claims.

¶ 56 Regarding Evelyn's disparate treatment claim, the County averred that it had not treated Evelyn disparately on account of his race. To support its assertion, the County pointed the trial court to evidence that, as with Polan, Evelyn was offered an opportunity to resign in lieu of termination but that, unlike Polan, Evelyn declined to do so.

¶ 57 Regarding Evelyn's hostile work environment claim, the County asserted that Evelyn "fail[ed] to establish a severe or pervasive racially hostile work environment." Further, the County averred that each act upon which Evelyn relied was "handled consistent with policy." To support its assertions, the County offered the following evidence:

(1) In a deposition, Evelyn was questioned about the circumstances surrounding Batties' remark about interracial dating. In response to a question asking Evelyn to recall the context of the conversation that led up to Batties' remark, he testified, "I can't remember exactly what the conversation was." Evelyn further testified to his belief that Batties, "might have been ... talking about her son" when she made the remark.

(2) When deposed, Evelyn was questioned about the

use of the "N" word by inmates. In response to a question asking Evelyn whether he had personally experienced Caucasian employees laughing when inmates utilized the "N" word, or whether he had heard about it, he testified, "I heard about it from other officers."

(3) When deposed, Evelyn was also questioned about how Batties treated him when she issued performance reviews and discipline. In response to a question asking Evelyn if Chief Batties gave him favorable performance reviews he testified, "[y]es." In response to a question asking Evelyn if the discipline that Batties imposed on him was minor, he testified, "I believe it was."

(4) When deposed, Evelyn was also questioned about whether Batties had offered for him to document his vacation in the same manner as Commander Costa. In response to a question asking Evelyn if Batties had said to him "[w]ell, you know, if you consider this to be some kind of perq that Nikki Costa is getting, go ahead and do it yourself. You can get the same thing[.]" he testified, "[y]eah, she did, she authorized me to do it."

(5) When deposed, Evelyn was also questioned about whether he considered the County's treatment (and resolution) of Vosberg's complaint to be evidence of discrimination against him on the basis of his race. In response to a question asking Evelyn if he considered the Vosberg incident to be evidence of racial discrimination against him, Evelyn testified, "No, but it bothered me."

(6) Both Evelyn and his colleague, Lamar Elliott, were deposed about the circumstances surrounding Elliott's request to wear his uniform to his child's school. In response to a question asking Evelyn if he believed that Anderson's comment to Elliott had some racial undertones, Evelyn testified, "[y]es."

*13 When deposed, Elliott was questioned about whether Anderson later contacted him to apologize. Elliott testified that Anderson "contacted me and asked me to come down to his office." When questioned about what happened in Anderson's office, Elliott stated his belief that the incident was "becoming more—a bigger issue than I thought it would become. And [Anderson] apologized. And I took it as an apology."

(7) In a declaration, Batties asserted her belief that Evelyn "was frequently rude, disrespectful and insubordinate to me."

(8) The County also presented the report that Arata wrote following the County's internal investigation into the sexual harassment allegations against Evelyn.

During that investigation, 32 witnesses were interviewed (including Evelyn). Seventeen of the 32 witnesses were proposed by Evelyn. The report contained testimony from many female employees detailing the sexual nature of the comments that Evelyn had allegedly made.

During Arnason's interview, she was questioned about the type of comments that Evelyn had allegedly made. Arnason stated that Evelyn "has made comments that I found offensive towards me." As an example, Arnason stated that Evelyn had told her, "[t]hat shirt looks very becoming on you, especially in the chest area."

Kelly Epperson, the director of nursing, was also interviewed. During Epperson's interview, she stated that Evelyn "says a lot of sexual things." Epperson recalled many statements as examples.

First, on one occasion, Evelyn walked into Epperson's office and said, "[h]ey boob, how's it going?" Second, Evelyn would approach Epperson and say, "[w]ow, you must be cold today, because--" while pointing to her breasts. Third, on one occasion, Epperson was discussing the fact that she had a new boyfriend with Evelyn when he stated, "[y]eah, white guys don't know how to have sex very well, but I could ride you so hard and you'd be so wet [that] you wouldn't be able to walk straight for three days." Fourth, Epperson recalled that Evelyn had told her "[o]nce you go black you never go back," and she stated that he, in fact, "says it all the time."

Nancy Reudink, an administrative assistant, was also interviewed. During Reudink's interview, she stated that Evelyn would make "[s]exual innuendos, just inappropriate comments," toward her. Reudink also recalled many statements as examples.

First, she stated that "[w]ell, [Evelyn] played--he liked to, like, he'd come up and get candy, take the candy wrappers, and apparently he thought my cleavage was a basketball hoop." Second, Reudink recalled that "the issue of sex came up and he would tell me that [my boyfriend] doesn't know how to please me, he would do me all night long." Reudink elaborated, stating that Evelyn had told her that he would "[r]ide me like I ride my Harley." Third, Reudink stated that Evelyn would tell her that she

has "big tits."

Julie Higgins, a physician assistant who worked in the medical unit from October 2007 to April 2008, was also interviewed. During Higgins' interview, she stated that Evelyn would make comments that were "inappropriate" and "made me feel uncomfortable." Higgins recalled two comments as examples.

First, on one occasion, Evelyn came into a room where she was pumping breast milk and stated, "[y]ou got all of that out of your tit?" Second, on another occasion, Evelyn was walking past Higgins when he said, "[y]our ass is fine."

¶ 58 The trial court granted summary judgment in favor of the County, dismissing both of Evelyn's claims.

***14** ¶ 59 Evelyn now appeals.

IV

¶ 60 Evelyn first contends that the trial court improperly granted summary dismissal of his hostile work environment claim. This is so, he asserts, because there exist unresolved material questions of fact as to whether the County, throughout the tenure of his employment (up to and including his termination), subjected him to a hostile work environment on the basis of his race. We agree.

To establish a prima facie hostile work environment claim, a plaintiff must show the following four elements: "(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." [Antonius v. King County, 153 Wn.2d 256,] 261 [, 103 P.3d 729 (2004)]. 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.' " Id. (alterations in original) (quoting Glasgow v. Ga.-Pac. Corp., 103 Wn.2d 401, 406–07, 693 P.2d 708 (1985)).

....

The standard for linking discriminatory acts together in the hostile work environment context is not high. "The acts must have some relationship to each other to constitute part of the same hostile work environment claim." Antonius, 153 Wn.2d at 271.

Loeffelholz v. Univ. of Wash., 175 Wn.2d 264, 275–76, 285 P.3d 854 (2012).

¶ 61 There is no real dispute that Evelyn met his burden with respect to the first and fourth elements of his prima facie case. Thus, our focus is on the second and third elements.

¶ 62 Regarding the second element, whether the harassment was because of Evelyn's race, the record does not establish either the context surrounding Batties' remark about interracial dating or the exact date on which it was made. However, viewing Batties' remark in the light most favorable to Evelyn, given that Evelyn was the only male person of color who was participating in the conversation at the time that the remark was made, and given that Batties knew that Evelyn was dating a Caucasian woman at the time, a reasonable jury could infer that Batties intended to express racial animus toward Evelyn. At the same time, Evelyn testified both that he could not "remember exactly what the conversation was" on that day, and that he believed Batties "might have been ... talking about her son" when she made the remark.

¶ 63 Taken together, the evidence presented by Evelyn and the County raise competing inferences from which a reasonable jury could infer either the existence or non-existence of racial animus toward Evelyn. These competing inferences, in turn, create a genuine issue of material fact concerning whether the alleged acts of harassment were substantially motivated by Evelyn's race. Jury questions are presented. See Scrivener, 181 Wn.2d at 445.

¶ 64 Having established that there is a genuine issue of material fact with regard to whether or not Evelyn's race was a substantial motivating factor in the alleged acts of harassment, it follows that the causal relationship (if any) between Batties' statement and the alleged acts of hostility as they relate (if at all) to the terms and conditions of Evelyn's employment is also a question for the jury. The County avers that Evelyn did not meet his burden as to this element because Batties' "one-time, stray comment" was not sufficiently pervasive to constitute a hostile work environment. Br. of Respondent at 40. This is a factual determination that is properly reserved for the jury, to be made based on the totality of the circumstance surrounding the work environment, including the other evidence of animus advanced by Evelyn. Thus, summary dismissal of Evelyn's hostile work environment claim was improper. Scrivener, 181 Wn.2d at 445. That order is reversed.

V

*15 ¶ 65 Evelyn next contends that the trial court improperly granted summary dismissal of his disparate treatment claim. This is so, he asserts, because there exist unresolved material questions of fact as to whether his race was a substantial factor motivating the County in taking an adverse employment action against him. We disagree.

¶ 66 The same summary judgment and burden shifting principles that were set forth previously apply to the resolution of Evelyn's disparate treatment claim. See Johnson, 80 Wn. App. at 226 30 (applying the McDonnell Douglas framework to a disparate treatment claim based on race).

¶ 67 Under the WLAD, it is an unfair practice for an employer to discriminate against any person in the terms or conditions of his or her employment on the basis of a protected characteristic, including race. RCW 49.60.180(3).

¶ 68 To establish a prima facie case of disparate treatment based on race, a plaintiff must show (1) that he or she belongs to a protected class, (2) that he or she was treated less favorably in the terms or conditions of his or her employment (3) than a similarly situated, nonprotected employee, and (4) that he or she and the nonprotected "comparator" were doing substantially similar work. Washington v. Boeing Co., 105 Wn. App. 1, 13, 19 P.3d 1041 (2000).

¶ 69 There is no real dispute that Evelyn met his burden with respect to the first, third, and fourth elements of his prima facie case. As to the second element, whether Evelyn was treated less favorably in the terms or conditions of his employment, our focus is on whether Evelyn put forth sufficient evidence from which a reasonable jury could infer that "[t]he [County] simply treats some people less favorably than others because of their race." (Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L.Ed. 2d 396 (1977)).

¶ 70 Evelyn did not present such evidence.

¶ 71 The County offered both Evelyn and Polan (his comparator) an opportunity to retire in lieu of receiving the adverse employment action of termination. Polan accepted the County's offer of retirement while Evelyn did not. In such a circumstance, Evelyn fails to establish the second element of his prima facie case--that he was treated less favorably in the terms and conditions of his employment. Evelyn elected not to accept the offer. He cannot "elect" himself into a cause of action. The County treated both the comparator and him similarly. Thus, the trial court properly granted summary judgment in favor of the County on Evelyn's disparate treatment claim.

¶ 72 Reversed in part, affirmed in part, and remanded.

We concur:

Schindler, J.

Cox, J.

All Citations

Not Reported in P.3d, 194 Wash.App. 1029, 2016 WL 3351562

Footnotes

1 The appellants each self-identified as a "person of color" in their complaint. Thus, the same term is used in this opinion.

2 A third person of color, Britt Easterly, filed suit against the County alleging similar acts of discrimination. Easterly's claims are not a subject of this appeal.

3 This document solicits information pertaining to an applicant's identity, current and former residences, employment history, financial history, and criminal record.

4 Candy Arata, the County human resources manager, explained that "[a] Rule of Three is a panel interview before three individuals from the branch in which the individual is an applicant."

5 Selection by a "Rule of Three" panel requires a consensus recommendation.

6 A score of at least 70 percent was considered "passing."

7 Edwards' oral board interview score was the second-highest score among all of the candidates who were interviewed for the same custody officer position.

8 Edwards pled guilty to two of the misdemeanor charges. The third charge was dismissed.

9 In its brief, the County suggests that Edwards was disqualified for several other additional reasons, which were set out on the PHS (and formed the basis of Hockett's recommendation that Edwards be removed from the custody officer selection process). However, upon conducting her investigation, attorney Jill Goldsmith found that Hockett "lacked judgment in coming to conclusions" about these other additional reasons for disqualification.

10 January 21, 2008 was a regularly scheduled work day for Hockett.

11 The record, in some places, indicates that Edwards contacted Back on the following day. This variance is of no significance.

12 In both Edwards' complaint and a pretrial deposition, he asserted that these telephone calls were not returned. In Goldsmith's final report following her investigation, she noted that "[o]utgoing telephone calls from County phones are not recorded separately so there is no way to determine if Back called Edwards back every time he called her." Edwards' testimony, however, indicates that in February he made several telephone calls to Back that lasted from 13 to 18 minutes.

13 Edwards never claimed this certified letter. Back later e-mailed the letter to Edwards.

14 The other stated reason for Edwards' removal was "verbal domestic disturbances."

15 Again, Edwards contends that some of these telephone calls were not returned. However, Goldsmith's final report states that Back "recalls speaking to [Edwards] during this period."

16 Goldsmith recommended that Edwards be reinstated to the background investigation stage of the process.

17 In Goldsmith's final report, she discussed her findings with regard to Nelson's potential influence on the "Rule of Three" panel's proceedings.

> Nelson inappropriately attempted to prejudice the Rule of Three panel against Edwards, drawing attention to the negative aspects of his background instead of allowing the panelists to make their own decision. Nelson specifically drew the panelists' attention to the fact that Edwards had been removed and reinstated after an appeal to the [Civil Service Commission], telling the panelists that there had not been a case of someone removed and reinstated who had been hired (as we have seen from Settell's record, this was in any case untrue). Whether Nelson was motivated by discrimination, retaliation or her sincere belief that Edwards' background should preclude him from progressing is difficult to decide. Regardless of her motives, I find her actions were inappropriate.

18 In Goldsmith's final report, she discussed her findings with regard to Hockett's interview style.

> Edwards, like Settell, was subjected to an inappropriately conducted background interview by Detective Hockett in that Hockett's interviewing style treated both candidates as though they were criminal suspects instead of job applicants. There is no evidence that Hockett's interviewing style varied from applicant to applicant based on race or other criteria; instead, the evidence is that he treated everyone in the same manner.

19 Because the WLAD is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C.2000(e)-2, Washington courts rely on federal decisions interpreting Title VII to decide issues under the WLAD. See, e.g., Oliver v. Pac. Nw. Bell Tel. Co., 106 Wn.2d 675, 678, 724 P.2d 1003 (1986); Haubry v. Snow, 106 Wn. App. 666, 674 n.7, 31 P.3d 1186 (2001).

20 A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. See [Int'l Bhd. of]Teamsters v. United States, [431 U.S. 324,] 358 n.44[,97 S. Ct. 1843, 52 L.Ed.2d 396 (1977)]. And we are

willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason based his decision on an impermissible consideration such as race.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L.Ed. 2d 957 (1978).

21 The elements of a prima facie case are not absolute but vary based on the relevant facts. See, e.g., Burdine, 450 U.S. at 253 n.6; McDonnell Douglas, 411 U.S. at 802 n.13; Grimwood, 110 Wn.2d at 363 (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1016–17 (1st Cir. 1979)).

22 This assumes that the jury views the offers as being good faith offers. Were the jury to view the offers as being made in bad faith (i.e., the offers of reinstatement were a ruse and Edwards' fate—not to be hired—was already determined) such bad faith might also cause the jury to view the County's "legitimate reason" as being pretextual.

23 Arata testified to her belief that Edwards was "mistakenly approved" to be reinstated to the Rule of Three stage of the application process. This goes to the weight of the evidence and is an argument properly presented to the jury. On summary judgment, it does not negate that circumstantial evidence of pretext was presented.

24 The record does not indicate the exact date on which the remark about interracial dating was made. We use May 7, 2008 as a reference point because Evelyn mentioned the remark in an internal complaint that he submitted on this date.

25 In its brief, the County contends that Batties' remark about interracial dating is not direct evidence of racial animus. In doing so, the County asserts that Batties remark is a statement about unprotected conduct (i.e., who Evelyn chooses to date), not a statement about a protected characteristic such as race. It is for the trier of fact to assign—or not assign—significance to the statement. On its face, the statement is one of race-based animus.

26 In its brief, the County asserts that there is a "common sense maxim that individuals of the same race are less likely to discriminate against each other on the basis of race." Br. of Respondent at 43. The law does not support this supposed "common sense" viewpoint. See, e.g., Castaneda v. Partida, 430 U.S. 482, 499, 97 S. Ct. 1272, 51 L.Ed. 2d 498 (1977) ("Because 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."); see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82, 118 S. Ct. 998, 140 L.Ed. 2d 201 (1998) (same-sex sexual harassment actionable under Title VII).

27 In the County's internal complaint, the complaining party's name is spelled "Sandi Vosberg." Elsewhere in the record, the complaining party's name is spelled "Sandy Vosburg." We adopt the spelling of the complaining party that is reflected in the County's internal complaint.

28 The record indicates that the complaining party refers to herself as "Andrea Arnason." In the record, her surname is sometimes given as "Aranson." We adopt her spelling of her own name.

29 The law allows Evelyn to aggregate this evidence in an attempt to establish a hostile work environment claim.

> The continuing violation doctrine is intended to address a series of acts that collectively constitute conduct based upon a discriminatory purpose. The doctrine provides that when a series of discriminatory acts occurs to create a cause of action for hostile work environment, all of the conduct may be considered when some of the related acts that arise out of the same discriminatory animus occur within the statute of limitations. Antonius[v. King County, 153 Wn.2d [256,] 263[, 103 P.3d 729 (2004)]. The plaintiff must establish one or more acts based upon the same discriminatory animus within the statute of limitations. Id. at 271.

Crownover v. Dep't of Transp., 165 Wn. App. 131, 141–42, 265 P.3d 971 (2011).

Although the statutory limitation period is not at issue herein, the doctrine allows Evelyn to rely on the acts, in aggregation, and to rely on one act to give context to other acts.

30 In a deposition, Arata was asked why she did not ask open-ended questions. She responded, "I asked the questions that I needed answered."

31 When deposed, Arata was also asked whether she had any concerns about interrupting a witness 20 times in a 42–page transcript. She responded, "[n]o." When questioned further, she stated that she was not concerned because she "got the information I needed from [the witness]."

32 Arata was also asked whether it was a good investigatory practice to interject a description of what a prior witness had said during a subsequent witness's interview. She responded, "You can call it good or you can call it bad.... It was a means to an end."

33 Haynes is also a person of color.

End of Document

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

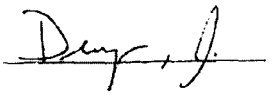
BRITT EASTERLY, Plaintiff, ELZY EDWARDS and CLIFFORD EVELYN, Appellants, v. CLARK COUNTY, a municipal corporation; CLARK COUNTY SHERIFF'S OFFICE, a department of Clark County, Respondent.	DIVISION ONE No. 74840-8-I ORDER DENYING MOTION FOR RECONSIDERATION

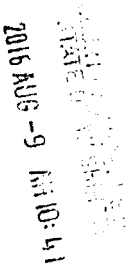
The respondent, Clark County, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

DATED this 9th day of August, 2016.

For the Court:





RCW 43.101.021

Policy.

It is the policy of the state of Washington that all commissioned, appointed, and elected law enforcement personnel comply with their oath of office and agency policies regarding the duty to be truthful and honest in the conduct of their official business.

[2010 c 294 § 1.]

RCW 49.44.120

Requiring lie detector tests—Penalty.

(1) It shall be unlawful for any person, firm, corporation or the state of Washington, its political subdivisions or municipal corporations to require, directly or indirectly, that any employee or prospective employee take or be subjected to any lie detector or similar tests as a condition of employment or continued employment: PROVIDED, That this section shall not apply to persons making application for employment with any law enforcement agency or with the juvenile court services agency of any county, or to persons returning after a break of more than twenty-four consecutive months in service as a fully commissioned law enforcement officer: PROVIDED FURTHER, That this section shall not apply to either the initial application for employment or continued employment of persons who manufacture, distribute, or dispense controlled substances as defined in chapter **69.50** RCW, or to persons in sensitive positions directly involving national security.

(2) Nothing in this section shall be construed to prohibit the use of psychological tests as defined in RCW **18.83.010**.

(3) Any person violating this section is guilty of a misdemeanor.

(4) As used in this section, "person" includes any individual, firm, corporation, or agency or political subdivision of the state.

(5) Nothing in this section may be construed as limiting any statutory or common law rights of any person illegally denied employment or continued employment under this section for purposes of any civil action or injunctive relief.

[2007 c 14 § 1; 2005 c 265 § 1; 2003 c 53 § 278; 1985 c 426 § 1; 1973 c 145 § 1; 1965 c 152 § 1.]

NOTES:

Intent—Effective date—2003 c 53: See notes following RCW **2.48.180**.

RCW 49.60.010

Purpose of chapter.

This chapter shall be known as the "law against discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

[2007 c 187 § 1; 2006 c 4 § 1; 1997 c 271 § 1; 1995 c 259 § 1; 1993 c 510 § 1; 1985 c 185 § 1; 1973 1st ex.s. c 214 § 1; 1973 c 141 § 1; 1969 ex.s. c 167 § 1; 1957 c 37 § 1; 1949 c 183 § 1; Rem. Supp. 1949 § 7614-20.]

NOTES:

Effective date—1995 c 259: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [**1995 c 259 § 7.**]

Severability—1993 c 510: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 510 § 26.**]

Severability—1969 ex.s. c 167: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [**1969 ex.s. c 167 § 10.**]

Severability—1957 c 37: "If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." [**1957 c 37 § 27.**]

Severability—1949 c 183: "If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the

application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." [**1949 c 183 § 13.**]

*Community renewal law—Discrimination prohibited: RCW **35.81.170**.*

RCW 49.60.030

Freedom from discrimination—Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW **48.30.300**, **48.44.220**, or **48.46.370** does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW **49.60.225** contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter **19.86** RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

[**2009 c 164 § 1**; **2007 c 187 § 3**; **2006 c 4 § 3**; **1997 c 271 § 2**; **1995 c 135 § 3**. Prior: **1993 c 510 § 3**; **1993 c 69 § 1**; **1984 c 32 § 2**; **1979 c 127 § 2**; **1977 ex.s. c 192 § 1**; **1974 ex.s. c 32 § 1**; **1973 1st ex.s. c 214 § 3**; **1973 c 141 § 3**; **1969 ex.s. c 167 § 2**; **1957 c 37 § 3**; **1949 c 183 § 2**; Rem. Supp. 1949 § 7614-21.]

NOTES:

Intent—1995 c 135: See note following RCW **29A.08.760**.

Severability—1993 c 510: See note following RCW **49.60.010**.

Severability—1993 c 69: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1993 c 69 § 17**.]

Severability—1969 ex.s. c 167: See note following RCW **49.60.010**.

Severability—1957 c 37: See note following RCW **49.60.010**.

Severability—1949 c 183: See note following RCW **49.60.010**.

RCW 49.60.120

Certain powers and duties of commission.

The commission shall have the functions, powers, and duties:

(1) To appoint an executive director and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(2) To obtain upon request and utilize the services of all governmental departments and agencies.

(3) To adopt, amend, and rescind suitable rules to carry out the provisions of this chapter, and the policies and practices of the commission in connection therewith.

(4) To receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter.

(5) To issue such publications and results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of sex, sexual orientation, race, creed, color, national origin, marital status, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability.

(6) To make such technical studies as are appropriate to effectuate the purposes and policies of this chapter and to publish and distribute the reports of such studies.

(7) To cooperate and act jointly or by division of labor with the United States or other states, with other Washington state agencies, commissions, and other government entities, and with political subdivisions of the state of Washington and their respective human rights agencies to carry out the purposes of this chapter. However, the powers which may be exercised by the commission under this subsection permit investigations and complaint dispositions only if the investigations are designed to reveal, or the complaint deals only with, allegations which, if proven, would constitute unfair practices under this chapter. The commission may perform such services for these agencies and be reimbursed therefor.

(8) To foster good relations between minority and majority population groups of the state through seminars, conferences, educational programs, and other intergroup relations activities.

[2007 c 187 § 5; 2006 c 4 § 5; 1997 c 271 § 4. Prior: **1993 c 510 § 6; 1993 c 69 § 4; 1985 c 185 § 10; 1973 1st ex.s. c 214 § 4; 1973 c 141 § 7; 1971 ex.s. c 81 § 1; 1957 c 37 § 7; 1955 c 270 § 8**; prior: 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614-25, part.]

NOTES:

Severability—1993 c 510: See note following RCW **49.60.010**

Severability—1993 c 69: See note following RCW **49.60.030**.

Effective date—1971 ex.s. c 81: "The effective date of this act shall be July 1, 1971." **[1971 ex.s. c 81 § 6.]**

*Human rights commission to investigate unlawful use of refueling services for individuals with disabilities: RCW **49.60.360**.*

RCW 49.60.180

Unfair practices of employers.

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

[**2007 c 187 § 9; 2006 c 4 § 10; 1997 c 271 § 10; 1993 c 510 § 12; 1985 c 185 § 16; 1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9.** Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

NOTES:

Severability—1993 c 510: See note following RCW **49.60.010**.

Effective date—1971 ex.s. c 81: See note following RCW **49.60.120**.

*Element of age not to affect apprenticeship agreements: RCW **49.04.910**.*

*Employment rights of persons serving in uniformed services: RCW **73.16.032**.*

*Labor—Prohibited practices: Chapter **49.44** RCW.*

*Unfair practices in employment because of age of employee or applicant: RCW **49.44.090**.*

No.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRITT EASTERLY, ELZY EDWARDS
and CLIFFORD EVELYN,

Respondents,

v.

CLARK COUNTY,

Appellant.

CERTIFICATE OF SERVICE
OF
PETITION FOR REVIEW

Mitchell J. Cogen, WSBA No. 46364
Bullard Law
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Portland, OR 97201
503-248-1134/Telephone
503-224-8851/Facsimile
Attorneys for Appellant

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the state of Washington as follows:

I am an attorney of the firm of Bullard Law. I caused to be filed via U.S. First Class mail in the above-entitled Court: PETITION FOR REVIEW and APPENDIX. I further caused the same to be delivered via U.S. First Class mail and addressed to the following opposing counsel:

Philip Talmadge Sidney Tribe Talmadge/Fitzpatrick/Tribe Third Floor, Suite C 2775 Harbor Avenue SW Seattle, WA 98126 Email: Phil@tal-fitzlaw.com; Email: Sidney@tal-fitzlaw.com	Emily Sheldrick Deputy Prosecuting Attorney Clark County Prosecuting Attorney's Office PO Box 5000 Vancouver, WA 98666-5000 Emily.Sheldrick@clark.wa.gov
Mr. Thomas S. Boothe, Attorney at Law 7635 SW Westmoor Way Portland, OR 97225-2138 Email: tsb@boothehouse.com	

DATED: September 8, 2016.

s/ Mitchell J. Cogen
Mitchell J. Cogen, WSBA No. 46364
Attorneys for Appellant