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SUPREME COURT OF THE STATE OF WASHINGTON
NO. ___________

(Court of Appeals No. 81411-7-I)

SAMIHA CARROLL,

Petitioner,

vs.

RENTON SCHOOL DISTRICT,

Respondent,

PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF PETITIONER

This case involves race and gender discrimination against a pregnant Black assistant principal attempting to serve a racially diverse student population in a public elementary school. It underscores the need for an explicit evidentiary standard for what constitutes a "reasonable person" in discrimination claims brought under the Washington Law Against Discrimination (WLAD). Ms. Carroll asks this Court to clarify the appropriate evidentiary standard for claims brought under the WLAD—and to instruct lower courts applying the standard to be aware of historical, institutional, subtle and implicit bias as they determine what is "reasonable" on summary judgment.

Dismissal of Ms. Carroll's claim was not unusual under the WLAD. Seventy years after the WLAD was enacted as one of the first laws in the nation designed specifically to combat discrimation, claims like Ms. Carroll's are dismissed on summary judgment more often than other types of cases.

In the meantime, an increasing body of research demonstrates that intuitions about allegations of discrimination are informed by the identity of the person. Studies now demonstrate that Blacks and Whites and, to a lesser extent, men and women, view allegations of race and gender discrimination differently. Even the most well-intentioned judges are

susceptible to this psychological tendency. Bias, in all of its forms, has a pernicious effect in the workplace and can exist even in seemingly well-meaning and not overtly biased people and institutions.

The obligation to address possible identity bias among judges deciding cases that involve allegations of discrimination rests with this Court and members of the judiciary. This Court has already made roadways with regard to racial bias in jury selection and deliberations. GR 37. As a result, in order to evaluate whether a potential juror was excluded from a Washington jury based on race or ethnicity, an objective observer—the judge evaluating the allegation—must be aware of implicit, institutional and unconscious biases that have excluded racial minorities from jury service. GR 37(e)(f). Ms. Carroll urges this Court to ensure that the WLAD's promise has meaning for people like her by providing clear and explicit guidance, like GR 37, to the lower courts.

II. COURT OF APPEALS DECISION

Ms. Carroll seeks appeal of the opinion filed on June 28, 2021 by Division I of the Court of Appeals affirming the King County Superior Court's summary judgment on her WLAD claims. *See* Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Given the current lack of racial diversity on the bench and growing social science research on historical, identity, institutional,

implicit, and intersectional biases, what guidance is necessary to avoid possible identity bias of trial court judges deciding summary judgment motions to dismiss Washington Law Against Discrimination claims, especially as those determinations rely on the trial court judge's determinations of "reasonableness"?

2. Does the failure to account for historical, identity, institutional, implicit, and intersectional biases in determining motions for summary judgment on WLAD claims implicate Due Process concerns by improperly denying WLAD plaintiffs a right to trial on their claims?

IV. STATEMENT OF THE CASE

A. Factual Background.

Ms. Carroll is an African-American educator who has dedicated her career to advancing the academic achievement of all students, and underserved students in particular. In June 2017, Ms. Carroll was hired to be the assistant principal of Lakeridge Elementary School in a district where over 50% of the student population is Black and on free or reduced lunch. (CP 210). Ms. Carroll was 6-months pregnant at the time she was hired. (CP 349).

Ms. Carroll's supervisor was Holly Megan Thompson, who was the principal at Lakeridge Elementary School since 2015. Ms. Thompson, who is Caucasian, did not have much experience working in a racially

diverse school like Lakeridge. (CP 210, CP 259). She struggled with issues of cultural competency with staff, students and parents at Lakeridge Elementary. (CP 182-183, 259, 263-264, 310-11, 313, 352).

During Ms. Carroll's hiring process, staff members expressed that the school needed an administrator who had "cultural awareness and really had done some deep work in cultural competency and understood the effects of institutional racism in education." (CP 186, 264). Ms. Thompson shocked and upset the Lakeridge staff when she suggested that the staff wanted her to simply hire a Black person regardless of qualifications. (CP 179). Staff had to repeatedly correct Ms. Thompson and explain that they wanted the most qualified person but that cultural comptency should be a consideration given the student body. (CP 179).

Ms. Thompson also expressed her low regard for and bias against the Black students at Lakeridge Elementary School to groups where Ms. Carroll was the only Black person present. (CP 351-52). Ms. Thompson spoke of how Black students who lived in Creston Point had to "code-switch" and become "aggressive" to prepare themselves to survive in their rough home environment. (CP 225-26 , 351-52). Ms. Carroll told Ms. Thompson about the negative impact of portraying the students as poor and Black children who "code-switch" to something "aggressive" and inferior at home. She told Ms. Thompson that a teacher's low

expectations and assumptions about their home life can limit students' success. (CP 224-25; CP 351). These generalizations about African-American and Black students, to a group where she was the only person who looked like them, made Ms. Carroll feel sad and belittled. (CP 352).

After the school year started, Ms. Carroll observed disparate treatment of students of color and raised her concerns with Ms. Thompson. (CP 227, CP 355-56). For example, one student of color in particular was allowed to sit in class without doing any work as long as he did not bother anyone. Ms. Carroll requested that Ms. Thompson do more for this student. Another time, Ms. Carroll questioned the frequency at which a student of color was being sent to the office for small infractions. Another incident involved Ms. Carroll challenging Ms. Thompson's assumption that a non-English speaking Somali parent's "English is perfect" even though she asked for a translator. Each time, Ms. Thompson explained to Ms. Carroll that she did not understand what she was talking about and took no action. (CP 355; CP 227). Another principal in the District, who was the acting assistant principal at Lakeridge during Ms. Carroll's maternity leave, testified that Ms. Thompson had approved of a teacher calling the police on an African-American second grader which she said was extreme but Ms. Thompson did anyway. (CP 313).

Ms. Carroll was also subject to disparate treatment as an administrator of color. Ms. Thompson directed Ms. Carroll to perform lunchroom and substitute teaching duties even though there were non-administrative staff who could have done those duties. (CP 355). Caucasian administrators were not required to do lunchroom duty at the same frequency as African-American administrators. (CP 184). Caucasian administrators were also given more opportunities for professional development and promotion than African-American administrators. (CP 326-27).

Ms. Carroll also suffered harassment and discrimination that could only happen to a person if she was a pregnant female or a new mother. Ms. Carroll was 6-months pregnant when she was interviewed but Ms. Thompson and other administrators did not know she was pregnant until after she was hired. (CP 249-50). Upon learning of Ms. Carroll's pregnancy, Jessica Granger, the Chief of School Improvement described the timing of Ms. Carroll's pregnancy as "really lousy" and otherwise expressed irritation at Ms. Carroll's request for maternity leave. (CP 250, CP 212). Ms. Thompson believed Ms. Carroll's maternity leave would "double" her workload and make her job difficult. (CP 223).

Ms. Carroll was subjected to constant comments from Ms. Thompson about her pregnancy, like "make sure you don't go into labor

early" and "keep that baby in until its due date." Ms. Thompson said this often as if Ms. Carroll was in control of when her body went into labor, and it caused Ms. Carroll anxiety about her due date. Ms. Carroll experienced high blood pressure for the first time in her life during this time and went into labor a month early. (CP 350, 353). Ms. Thompson was so intrusive into Ms. Carroll's pregnancy that she repeatedly texted Ms. Carroll about work while Ms. Carroll was laboring to deliver her baby. (CP 451-55).

Starting the day Ms. Carroll returned from her maternity leave, Ms. Thompson and Ms. Carroll's subordinates took notes and reported vague complaints about Ms. Carroll's demeanor and tone. (CP 245-46). One person told Ms. Thompson that she could hear Ms. Carroll "laughing & giggling" and Ms. Carroll's "tone was rude." (CP 270). Another person told Ms. Thompson that Ms. Carroll had an "unfriendly tone" and was "standing by garbage cans did not move for 7 minutes". (CP 278-79). Ms. Carroll was monitored on her whereabouts on campus at Ms. Thompson's request, presumably to investigate Ms. Carroll's child care situation. (CP 194-95, 245, 270-77). Emboldened by Ms. Thompson, Ms. Carroll's colleagues and subordinates felt free to challenge, disrespect and

belittle her. (CP 354).[1] When Ms. Carroll asked Ms. Thompson to speak respectfully to her, Ms. Thompson stated, "We can't stop just to make you feel comfortable." (CP 355).

Ms. Carroll was also harassed for trying to pump breastmilk at work to the point that she was often physically uncomfortable from not expressing milk while at work. (CP 229, 239, 354, 481). Ms. Thompson also expressed concern about Ms. Carroll not being qualified, not having proper training or if she was "feeling rusty" after coming back from maternity leave. (CP 354, 243).

Ms. Thompson's harassment of Ms. Carroll came to a head when Ms. Thompson made a false report to Child Protective Services that Ms. Carroll was physically neglecting her 8-year old son. (CP 355). Ms. Thompson falsely stated on the CPS report that Ms. Carroll told her that she had left [M.C.] home during the school day and that Ms. Thompson was concerned that Ms. Carroll's son was left home alone. (CP 437). Ms. Thompson admitted that she wasn't sure why she assumed Ms. Carroll's son was home alone. (CP 232, 247). In fact, Ms. Carroll had a nanny for her newborn child and her 8-year old was not left home alone. (CP 357).

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[1] This conduct involving unnecessary surveillance and vague complaints about demeanor is also evidence of racial bias.

The timing of Ms. Thompson's report was malicious. Ms. Thompson initially told Ms. Carroll that she could call CPS but would not. (CP 130, 358). This implied threat caused Ms. Carroll to be extremely frightened for her family and employment. (CP 358). Ms. Carroll knew the impact that a CPS report of child neglect, even if unfounded, could have on her career as an educator that she worked so hard for. (CP 360). After Ms. Thompson threatened to call CPS, Ms. Carroll had to seek immediate medical attention for her skyrocketing blood pressure. (CP 358-59). Ms. Carroll sent a text message to Ms. Thompson: "I'm feeling ill my blood pressure skyrocketing. I need to go home." (CP 372). *After* Ms. Thompson received this text, she changed her mind and made the CPS report knowing it would "make her not trust in me as her supervisor and that it would make her uncomfortable at work." (CP 131, 235).

Ms. Carroll was extremely distressed over this threat to her family and livelihood and the continuing hostile work environment. Ms. Carroll, who is also a mandatory reporter, believed that her supervisor's CPS report of her to be malicious and not supported by any evidence. (CP 359). Her 8-year old son also struggled with thoughts of being separated from his family and received counseling after this incident. (CP 359).

Ms. Carroll resigned within a week of the CPS report, citing a toxic work environment in her resignation letter. (CP 235, 320, 359, 373).

The District did not consider Ms. Carroll's resignation letter citing a "toxic work environment" to be a complaint of hostile work environment. (CP 76, 485). In fact, after Ms. Carroll's resignation, administrators at the District were lighthearted, sending thumbs up emojis and joking about Ms. Carroll. (CP 337-38). Dr. Love, who Ms. Carroll sought help from, joked, "You get HUGE points for this one. LOL. She was so FRIGHTENED OF YOU that she didn't want to face the TITO-MATOR (Terminator). LOL," referring to Ms. Tito the Executive Director of Human Resources for the District. (CP 340). The same day Ms. Carroll resigned, the District identified her replacement—Ms. Thompson's choice—who is Caucasian and was not credentialed for the Assistant Principal position. (CP 341, 344, 345).

Nobody from the District ever asked what toxic work environment Ms. Carroll was referring to until after Ms. Carroll filed her lawsuit. (CP 360). Laurie Taylor, the Assistant Superintendent of Human Resources testified that she determined that Ms. Carroll's work environment was not hostile without even speaking with Ms. Carroll. (CP 293).

When Ms. Thompson was asked by staff why Ms. Carroll resigned she falsely said that Ms. Carroll was "feeling stressed out by the fact that she had a newborn baby" and "I think she may have wanted to stay home with the baby." (CP 241).

B. Procedural History.

In July 2018, Ms. Carroll brought this WLAD lawsuit for discrimination, harassment, constructive discharge and retaliation on the basis of race and pregnancy against the District. Defendant's motion for summary judgment was heard and granted on June 28, 2019, two weeks before trial was scheduled to begin. (CP 10; CP 115). The trial court judge made numerous determinations of "reasonable inference" in deciding the Defendant's motion. (RP 28, 33) Ms. Carroll filed a motion for reconsideration, which was denied. Ms. Carroll sought direct review of this order from this Court, which was denied. The Division I Court of Appeals affirmed the trial court's decision on June 28, 2021, also making numerous determinations of what a "reasonable person" would find constituted discrimination. Ms. Carroll now seeks discretionary review, again, from this Court.

V. ARGUMENT

A. This Court Should Grant Review Under RAP 13.4(b)(4) Because the Fair Enforcement of WLAD Claims is an Issue of Substantial Public Interest.

In enacting the Washington Law Against Discrimination, the Washington Legislature expressly acknowledged the public's interest against discrimination because discrimination against an individual also "menaces the institutions and foundations of a free democratic state."

RCW 49.60.020. Though this Court and the Legislature have mandated that the WLAD be interpreted expansively to eliminate and prevent discrimination, these claims continue to suffer low likelihood of success.

Scholars, using empirical studies, show that discrimination plaintiffs fare worse than all other litigants except for prisoner plaintiffs.[2] *See e.g.*, Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 890 (2006) ("*Lessons in Losing*"); Michael Selmi, *Why Are Employment Cases So Hard to Win?*, 61 LA. L. REV. 555, 556-57 (2000-01) ("*Why Are Employment Cases So Hard to Win*"); Theresa M. Beiner, *The Trouble with Torgerson: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673, 673-74 (2014) ("*Trouble with Torgerson*"). They beg the question why courts increasingly reject most of these claims when there is still substantial evidence of bias in the workplace. *See* Minna Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1444 (2009) ("*Diversity and Discrimination*").

[2] These studies are largely based on federal cases because of the data maintained by the EEOC and the federal trial court practice of written opinions. The EEOC complies statistical reports on the number of charges filed each year. *See* Statistics, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM., https://www.eeoc.gov/eeoc/statistics/index.cfm (last visited Dec. 16, 2019).

With race discrimination cases, judges are even more likely to agree with the defendant that they are right as a matter of law. *See* Parker, *Lessons in Losing,* at 934; Selmi, *Why Are Employment Cases So Hard to Win*, at 556-57. In cases involving intersectional identity—where the discrimination is based on a combination of protected identity—the odds are even lower. *See* Kotkin, *Diversity and Discrimination*, at 1459.

This Court has observed that proving purposeful discrimination is difficult because people are ignorant of the actual reasons for their discrimination and/or they predictably refuse to admit it. *See, e.g., State v. Saintcalle*, 178 Wn.2d 34, 46-50, 309 P.3d 326, 335-337 (2013) (abrogated on other grounds). "Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus." *See id.* 178 Wn.2d at 46, 309 P.3d at 335.

Growing social science research shows that judicial intuitions about reasonability are informed by the identiy of the judges. Judges' intuitions about reasonableness are inevitably influenced by their own race and gender. *See* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1105-06 (2008) ("*Perceptual Segregation*"). Here, in Washington State, over 90% of the state court judges are White and

over 56% are White men. *See* Tracey E. George and Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, p. 25, *available online at* https://gavelgap.org/pdf/gavel-gap-report.pdf (last visited Dec. 12, 2019). Women of color make up 15% of the state population, but only 4% of the Washington State judiciary. *Id*. The judicial demographic is similar across the nation. *Id*.; *see also* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 95-96 (1997).

This influence—which does not rise to bias in the vast majority of cases—becomes problematic in the context of enforcing antidiscrimination laws like the WLAD because "the judges that enforce it are usually members of privileged groups and have little direct experience with, or sensitivity to, the perception of outsiders." Robinson, *Perceptual Segregation*, at 1105-06. Employment discrimination lawsuits, therefore, have the potential to involve discrimination by the judge in addition to discrimination by the employer. Beiner, *The Trouble with Torgerson,* at 693, *citing* Nancy Gertner & Melissa Hart, *Employment Law: Implicit*

Bias in Employment Litigation, in IMPLICIT RACIAL BIAS ACROSS THE LAW 80, 80 (Justin D. Levinson & Robert J. Smith eds., 2012)[3].

Social science research shows that many Americans perceive discrimination as rare, even when there is relatively strong evidence of discriminatory intent. *See* Katie E. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1321 (2012) ("*That's Not Discrimination*"). This attitude is attributed to an intractable belief that America is a meritocratic society where discrimination is an explicit and aberrant phenomenon. *Id*. With race in particular, antidiscrimination laws passed in the Civil Rights era have added to the perception that "present inequities cannot be the result of discriminatory practices because this society no longer discriminates against Blacks." Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 191 HARV. L. REV. 1331, 1347 (1988); *see also* Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109 (2012), *available at* http://yalelawjournal.org/forum/losers-rules (last visited Dec. 16, 2019). Therefore the psychological response is to deny the allegation of discrimination and blame the victim for a lack of diligence and hard work.

[3] The Honorable Nancy Gertner served as a United States District Judge of the United States District Court for the District of Massachusetts from 1993 to 2011.

Eyer, *That's Not Discrimination*, at 1306-07. Because of the perception that discrimination is rare, "some might respond that blacks and women tend to exaggerate discrimination, and thus their perceptions of discrimination would provide an unreliable baseline for the law." *See* Robinson, *Perceptual Segregation*, at 1139.

Without legal guidance that incorporates this social science research and/or a more diverse judiciary, the judiciary is susceptible to these psychological tendencies. One study published in 2012 found that White judges granted summary judgment in employment cases 61% of the time, compared with 38% of minority judges. *See* Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 682 (2012-2013), *citing* Jill D. Weinberg & Laura Beth Neilsen, *Examining Empathy: Discrimination, Experience and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313 (2012). Another empirical study shows that African-American judges as a group and White judges as a group perceive racial harassment differently. Pat K. Chew & Robert Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. UNIV. L. REV. 1117, 1156-57 (2009). In other words, "judges are not different from people in general." *Id*. at 1157.

B. This Court Should Grant Review Under RAP 13.4(b)(3) Because Improperly Dismissing WLAD Claims on Summary Judgment Raises Due Process Concerns.

Structural racial bias in the judicial system raises issues of Due Process. *See* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 98-99 (1997-1998) (discussing due process concerns with a non-diverse judiciary); U.S. CONST., amend XIV.

The unequal treatment of African-Americans in the legal system, and the perception of it, is well documented. For example, a 2013 Pew Research Center survey found a large and consistent gap in Black-White perceptions of fair treatment in various institutions, the highest gap existing in perceptions of the court system.[4] 68% of Blacks, compared to 27% of Whites, surveyed believed that the Blacks in their community were treated less fairly than Whites in the court system. *Id*. A 2018 Gallup Poll had similar results but found that forty-five percent of Whites surveyed believed that the American justice system is biased against Black people compared to seventy-six percent of Blacks. Race Relations Survey, GALLOP, https://news.gallup.com/poll/1687/race-relations.aspx

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[4] Eileen Patten, *The black-white and urban-rural divides in perceptions of racial fairness*, PEW RESEARCH CENTER (Aug. 28, 2013), *available at* https://www.pewresearch.org/fact-tank/2013/08/28/the-black-white-and-urban-rural-divides-in-perceptions-of-racial-fairness/ (last visited Dec. 16, 2019).

(last visited Dec. 16, 2019). Especially where there is data to indicate that a jury would be more sympathetic than a judge, a judge's summary dismissal of a case unfairly deprives the employment plaintiff of her day in court. *See* Beiner, *The Trouble With Torgerson*, at 694.

Twenty-four states, including Washington, have formed independent commissions to study the prevalence of race and/or gender bias in state courts. *Id.*; *see also* Gender and Racial Fairness, NATIONAL CENTER FOR STATE COURTS, https://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/State-Links.aspx#Alaska (last visited Dec. 16, 2019). The Washington State Minority and Justice Commission aims to (1) identify the impact of racial bias on quality of justice, (2) eliminate such bias and prevent its reoccurrence, and (3) collaborate to achieve these goals. *See* Our Mission, WASH. STATE MINORITY AND JUSTICE COMM'N, WASH. COURTS, http://www.courts.wa.gov/?fa=home.sub&org=mjc (last visited Dec. 18, 2019).

In the criminal context, the inquiry into racial bias as been focused on juries and jury selection. The U.S. Supreme Court recognized in *Peña-Rodriguez v. Colorado*, 580 U.S. __, 137 S.Ct. 855, 868 (2017) ("*Peña-Rodriguez"*) that bias or prejudice based on race are especially pernicious in the jury system because it "damages both the fact and the perception of

the jury's role as a vital check against the wrongful exercise of power by the State." *Id*. Racial bias is significantly different from other types of improper conduct because it implicates unique historical, constitutional and institutional concerns. *Id.* This Court has acknowledged that "implicit racial bias can affect the fairness of a trial as much as, if not more, than 'blatant' racial bias" and therefore requires tailored solutions. *State v. Berhe*, 193 Wn.2d 647, 662, 444 P.3d 1172, 1180 (2019).

This Court has recently taken steps to ensure that the judiciary has the guidance to interrupt historical and institutional inequities that exclude racial minorities from jury service. With this Court's adoption of GR 37, trial court judges are now tasked to evaluate allegations of racial bias in jury selection and deliberations in the shoes of an "objective observer." GR 37 defines an objective observer as one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington state." GR 37(f); *see also State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2019) (applying standard to jury deliberations). GR 37 applies to criminal and civil cases.

VI. CONCLUSION

Without a judiciary informed in the historical, identity, institutional and subtle forms of discrimination that exist today, judges risk gutting the

expansive protections of the WLAD. On summary judgment, the trial court judge should be held to some standard other than his or her own limited subjective interpretation of what is reasonable. Guidance from this Court, akin to GR 37, is necessary to fully effectuate the Legislature's intent in enacting the WLAD. The plaintiff will ultimately have the burden to persuade a jury that the plaintiff's protected status was a substantial factor in the adverse employment action taken against her. However, it should be the judiciary's role, with proper guidance from this Court, to evaluate "reasonableness" in the context of historical, identity, institutional and implicit biases. Continuing to allow employment cases to fare poorly, given the undeniable social science research on historical, identity, institutional and implicit biases, implicates Due Process concerns.

RESPECTFULLY SUBMITTED this 27th day of July, 2021.

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CERTIFICATE OF SERVICE

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APPENDIX A

FILED
6/28/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SAMIHA CARROLL, an individual,

Appellant,

v.

RENTON SCHOOL DISTRICT, a Washington municipal corporation,

Respondent.

No. 81411-7-I

DIVISION ONE

UNPUBLISHED OPINION

APPELWICK, J. — Carroll appeals from dismissal on summary judgment of her claims under the Washington Law Against Discrimination[1] against her former employer. She argues numerous issues of material fact exist. Further, she argues the court erred by failing to consider that historical, institutional, implicit, and intersectional biases should inform the court's evaluation of whether discriminatory intent was behind an adverse employment action. We affirm.

FACTS

Employment Facts

In June 2017, Samiha Carroll was hired to work for the Renton School District (District) as the Lakeridge Elementary School (Lakeridge) assistant principal. Carroll is an African-American woman, and was six months pregnant at the time she was hired. Holly Thompson, principal at Lakeridge, served on the committee that conducted interviews of applicants for the assistant principal

[1] Ch. 49.60 RCW.

position. Neither the District nor the hiring committee knew that Carroll was pregnant at the time it hired her.

On July 3, 2017, Carroll began her role as assistant principal. However, she was asked by Thompson to take a week of vacation her first week because Thompson would also be on vacation. Thompson was on vacation for three or four weeks during Carroll's first month of employment. Thompson returned from vacation in late July.

On or around July 10, 2017, Carroll informed Thompson that she was pregnant and had a September 15, 2017 due date. She relayed that she was planning to take six weeks of maternity leave.[2] Carroll stated that she was subsequently subjected to "constant comments from Ms. Thompson" regarding her pregnancy, such as "'make sure you don't go into labor early'" and "'keep that baby in until its due date.'" She said it caused her anxiety about her due date. She does not indicate if she communicated these concerns to Thompson.

In July or early August, Carroll asked Thompson what the staff was looking for in an administrator when they hired someone. Thompson says she told her there were "many different things that they had listed, one of those being a candidate of color." Carroll stated Thompson later told her she could not understand why staff wanted an administrator of color, and that the conversation made Carroll feel "sad, discouraged and very uncomfortable." Carroll says Thompson also began making comments suggesting she was unqualified for her position, such as "'you probably haven't had to do this.'" After being informed by

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[2] In the District, school usually starts before Labor Day.

Thompson that Carroll needed support, the positive discipline trainer began consistently asking her if she needed help. Carroll stated this was because she asked Thompson why students were being sent to the office for small offenses. Carroll contends the comments made to the positive discipline trainer suggested she was not qualified for the assistant principal position. Thompson says during the summer, she and Carroll discussed the racial disparity regarding administrative discipline of students. Thompson recalls this discussion occurring in the context of a conversation about the positive discipline model used by administrators at Lakeridge.

Carroll unexpectedly went into labor on August 24, 2017. Thompson contacted Carroll several times during her maternity leave with what Carroll described as "'friendly' complaints about my absence and offers to come to my home and help with my baby."

Carroll returned from maternity leave on or around Monday, October 9, 2017. Upon her return from maternity leave, Carroll said Thompson complained to others about her unavailability during times she was pumping breastmilk. Carroll does not identify these individuals or when the statements were made. Thompson said she let Carroll know in July and when she returned from leave that she supported her pumping breastmilk at work. But, Thompson was concerned when she was unable to locate Carroll for long periods of time each day and when Carroll did not follow the protocol the school had for responding to her radio. Her assumption was that this inaccessibility was associated with Carroll's need to pump breastmilk. Thompson contacted Debra Tito, executive director of Human

Resources (HR), for guidance on accommodating Carroll's need to pump breastmilk at work. By October 15, 2017, Thompson and Carroll had agreed to a schedule for pumping. Thompson let Carroll know it was alright to put up a piece of butcher paper on the window of her door for privacy and to turn her radio off while pumping breastmilk.

Carroll also had concerns about comments she considered racially based made by Thompson. Lakeridge has a diverse student body, serving large Somali and African-American student populations. Carroll describes a meeting with the new teachers where Thompson described "'code switching' by our African-American Lakeridge students who live in Creston Point, a low-income housing development where many of the Lakeridge students live. . . . She believed students began "'posturing' and speaking aggressively and using poor language because they had to prepare themselves to go back to . . . the rough environment they lived in." Carroll said she "had heard of the term 'code-switch' in linguistics but not as an educational term or a term that referred to behavior." Carroll was the only African-American employee in the conversation. Hearing these generalizations made her feel "sad, belittled, and uncomfortable."

Carroll says Thompson also wanted to take new teachers on a driving tour of Creston Point "to give them a better sense of the poverty and desolation our students came from." This troubled Carroll, who has seen how student success can be limited by low expectations. She raised these concerns with Thompson, but says Thompson dismissed her concerns, presenting her "racially-biased

comments in an authoritative tone." The specifics of Thompson's comments are not in the record below.

Carroll says Thompson similarly dismissed her concerns over other incidents involving race. Carroll raised concerns over the frequency a student of color was sent to the office for small infractions, a student of color who was allowed to sit in class without doing work, and a lack of translation support for a non-English speaking Somali parent.

She also took issue with the frequency she was asked to take over lunch duty. On October 18, 2017, she says Thompson publicly yelled at her for being late to lunch duty.

After returning from maternity leave, Carroll was having difficulty locating before- and after-school childcare for her eight year old son, M.C., who attended a different elementary school in the district. The District's student school day for M.C. started later than Carroll's work day at Lakeridge. Thompson stated that Carroll would not be allowed to bring M.C. on campus to wait until his school start time. Carroll asserts the assistant principal at M.C.'s school offered to allow him to sit in her office and read until school started, but was told after a week she could no longer allow him to do so. On October 13, 2017, Carroll stated she left M.C. at home with her nanny and his younger brother. Monday and Tuesday of the following week, she took her son to school before coming to work. Thompson told her this was unacceptable and that she could not be late in order to take her son to school. Thompson also said she learned that Carroll had been leaving campus to take her son to school.

On Friday, October 20, 2017, Carroll left her son in the car at Lakeridge while she attended a staff training session inside. M.C. knocked on the locked door to the school crying after the car alarm had gone off. The school office manager let him in and pulled Carroll out of the training and informed her what had happened. Carroll did not return to the meeting. Instead, she stayed with her son and then drove him to school. After the meeting, the school office manager informed Thompson about what had occurred. Thompson states that after Carroll returned to campus, Carroll informed Thompson that she had left him in the car because she did not have anywhere else for him to stay until the school day started. Thompson told Carroll she would not file a Child Protective Services (CPS) report. Carroll left work early, telling Thompson she was feeling ill.

After Thompson's supervisor, Jessica Granger, asked why Carroll was not at school, Thompson informed her of what had occurred. Granger directed her to call HR. HR directed her to call CPS. Thompson then spoke with CPS on the phone and was directed to submit a written report. Thompson is a mandatory reporter.

Thompson then wrote a report of suspected child abuse and/or neglect. In her report, she wrote that Carroll had left her son in her car in the school parking lot on three occasions. She wrote that on the third occasion,

> At around 8:30am [M.C.] banged on the door of the Lakeridge main office. The office manager let him into the building and asked what was wrong. The office manager stated that [M.C.] was very upset and needed time to calm down before he could talk to her. Once he was calmer he shared with her that he had been in his mother's locked car and when he went to open the car door the alarm went off. He stated that he was very scared and did not have the key to

> the car to turn off the alarm. In addition, on Friday October 13, 2017 Ms. Carroll told her supervisor that she had left [M.C.] at home that school day because she did not have a way to get him to school due to the late start time. There are no other known adults that live in the house with the family so I am concerned that he was left home alone all day.

That evening, Thompson left a voicemail message for Carroll informing her of the CPS report. She stated she was concerned the report "would make her upset and that it would make her not trust in me as her supervisor and that it would make her uncomfortable at work."

On Monday, October 23, 2017, Carroll contacted Debra Tito, executive director of HR, and scheduled a meeting to discuss the CPS report and her concerns about a hostile work environment. The meeting was scheduled to take place on October 27, 2017. She also contacted Dr. Elaine Love, the president of the District's Principal Association, to ask her to represent her in that meeting. On October 26, 2017, Love told Carroll she could not represent her, but agreed to attend the meeting.

On October 27, 2017, Carroll resigned. She sent a text message to Thompson and a letter of resignation later that day stating, "[T]he work environment has become too toxic to remain."

Procedural History

In July 2018, Carroll filed a suit against the District for claims of discrimination, harassment, constructive discharge, and retaliation on the basis of race and pregnancy. On May 31, 2019, the District moved for summary judgment.

Carroll deposed several District employees. Leslie Ehrlich, who participated in Carroll's interview process, discussed staff conversations related to

the hiring process during her deposition. She stated that staff communicated their desire to have race be a consideration because they "really wanted our staff to reflect our students in terms of race and culture." She paraphrased Thompson as saying, "'What do you want me to do? Do you want me to just screen rèsumès based on names and pick from that?' alluding to should she screen names that appear to be someone who is African[-]American or [B]lack and pull those rèsumès to hire."

Thompson was questioned about the circumstances surrounding her report to CPS. She stated that Carroll told her she had left her son in her car before, on "either Wednesday or Thursday." Carroll asserts that she "did not tell her that." When asked about whether Carroll had told her she left M.C. "alone," Thompson replied, "I think she did, because I don't know why I would have assumed [he was] alone otherwise." Thompson also spoke about her concerns regarding Carroll's preparedness to fulfill her duties. In Carroll's first week back after returning from maternity leave, Thompson was concerned that Carroll was not prepared for how to interact with students who were "escalated," and was not sure "if she didn't have training to do that or she was feeling rusty coming back."

Angela Bogan, who provided support while Carroll was on maternity leave, stated she would have handled the situation leading to the CPS report differently. Bogan also recalled Thompson discussing code switching in reference to the behavior of students in an apartment building with "a high percentage students" of "East African descent." During her deposition, Thompson described student

behaviors such as an "increase in aggression" and preparing to "take care of themselves as adults when they go home" in reference to code switching.

An educational article in the record defines "code switching" as "assess[ing] the needs of the setting (the time, place, audience, and communicative purpose) and intentionally choos[ing] the appropriate language style for that setting." The article does not discuss the term in relation to behaviors or aggression. The article discusses the term in relation to helping "urban African[-]American students use language more effectively" by providing them with strategies to "reflect on the different dialects they use and to choose the appropriate language for a particular situation." Carroll felt her concerns that Thompson's comments were racially discriminatory were dismissed by Thompson.

Discovery also included communications between several District employees. An e-mail from Granger, the chief of school improvement, relayed to the assistant superintendent of learning and teaching that Carroll was pregnant, stating "the timing is really lousy." When Carroll delivered early, Thompson sent a text to her supervisor saying, "Guess which Lakeridge admin went into labor? Hint it's not me." Granger responded, "Wow, superb timing." There was also an e-mail thread regarding Carroll's resignation. On October 27, 2017, Tito informed Love the scheduled meeting was cancelled due to Carroll's resignation. Love replied to Tito saying,

> You get HUGE points for this one. LOL [(laugh out loud)]. She was so FRIGHTENED OF YOU that she didn't want to face the TITO-MATOR (Terminator). LOL. She called me last night and I told her she better think clearly about that decision. I guess she didn't listen.

Tito forwarded the response to Granger and Thompson.

On June 28, 2019, the summary judgment motion was heard. The court granted the District's motion for summary judgment. Carroll filed a motion for reconsideration. That motion was denied. Carroll then sought direct review of the order granting summary judgment in favor of the District by our Supreme Court. She asserted direct review was warranted because the appeal involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination" as provided under RAP 4.2(a)(4). The court unanimously agreed to transfer the case to Division I of the Court of Appeals.

DISCUSSION

Carroll argues that the trial court erred in granting the District's motion for summary judgment. She argues summary judgment should be reversed under the existing standard because numerous issues of disputed fact exist in relation to her Washington Law Against Discrimination (WLAD), ch. 49.60 RCW, claims. Additionally, she argues that in order to effectuate the purposes of WLAD, this court should provide additional guidance to the lower courts by extending and adopting an evidentiary standard that accounts for judicial identity bias, similar to jury selection bias under GR 37.

I. Summary Judgment

Carroll asserts that genuine issues of material fact exist in relation to her claims under WLAD.

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 proper 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). The court considers all facts and makes all reasonable factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharm., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

WLAD prohibits employers from discharging or discriminating against any employee on the basis of a protected characteristic, including race and gender. RCW 49.60.180(2)-(3). WLAD is to be construed liberally to accomplish its purpose of preventing practices of discrimination, which "threaten[ ] not only the rights and proper privileges of [Washington's] inhabitants but menace[ ] the institutions and foundation of a free democratic state." RCW 49.60.010; RCW 49.60.020. Carroll's claims require her to establish discriminatory or retaliatory intent. See RCW 49.60.030(1); Cornwell v. Microsoft Corp., 192 Wn.2d 403, 414, 430 P.3d 229 (2018) (describing retaliation as an intentional act); Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County, 189 Wn.2d 516, 526-27 404 P.3d 464 (2017) (describing the difficulty for plaintiffs to prove intentional discrimination in employment discrimination cases).

Summary judgment is often inappropriate in discrimination cases brought under WLAD, as the evidence "will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury." Davis v. W. One Auto. Grp., 140 Wn. App. 449, 456, 166 P.3d 807 (2007). Direct, smoking gun evidence of discriminatory animus is rare, since there will seldom be eyewitness testimony as to the employer's mental processes.

Mikkelsen, 189 Wn.2d at 526. Accordingly, plaintiffs may rely on circumstantial, indirect, and inferential evidence to establish discriminatory action. Id.

However, the plaintiff must do more than express an opinion or make conclusory statements to overcome a motion for summary judgment. Marquis v. City of Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). They must establish specific and material facts to support each element of their prima facie case. Id. When the plaintiff fails to raise an issue of material fact on one or more prima facie element of the claim, summary judgment remains appropriate. Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 27, 244 P.3d 438 (2010).

A plaintiff may establish a prima facie case of discrimination by either offering direct evidence of an employer's discriminatory intent, or by satisfying the burden-shifting test announced in McDonnell Douglas[3] that gives rise to an inference of discrimination. Kastanis v. Educ. Emps. Credit Union, 122 Wn.2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993); Alonso v. Qwest Commc'ns Co., 178 Wn. App. 734, 743, 315 P.3d 610 (2013).

First, the plaintiff must make a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802; Mikkelsen, 189 Wn.2d at 527. If the plaintiff establishes a prima facie case, it creates a rebuttable presumption of discrimination. Mikkelsen, 189 Wn.2d at 527.

Second, the burden shifts to the defendant, who must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Id.

[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

Third, if the defendant meets this burden, the plaintiff must produce sufficient evidence showing that the defendant's proffered reason is pretextual. Id. The plaintiff may demonstrate this 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. Id.

Carroll asserts that she provided direct evidence of discrimination, but also shows a prima facie claim under the McDonnell Douglas framework. She does not offer analysis or citation to support her claim that she provided direct evidence, but analyzes her claims under McDonnell Douglas.

Carroll asserted claims of hostile work environment, constructive discharge, discrimination, and retaliation. She claims that the hostile work environment was in retaliation for her raising issues about disparate treatment of African-American students and for asserting her right to pump breast milk. Her discrimination claim relies on her claims of hostile work environment and constructive discharge as adverse employment actions.

II. Hostile Work Environment

To establish a prima facie case of hostile work environment, Carroll must produce evidence that she was subjected to harassing conduct that (1) was unwelcome, (2) was due to her membership in a protected class, (3) affected the terms and conditions of her employment, and (4) is imputable to the employer. Loeffelholz v. Univ. of Wash., 175 Wn.2d 264, 275, 285 P.3d 854 (2012). Carroll must produce competent evidence that supports a reasonable inference that her

protected status was the motivating factor for the harassing conduct. Sangster v. Albertson's, Inc., 99 Wn. App. 156, 161, 991 P.2d 674, 678 (2000). It must be objectively and subjectively abusive. Adams v. Able Bldg. Supply, Inc., 114 Wn. App. 291, 297, 57 P.3d 280 (2002).

Carroll alleges four categories of harassing conduct to satisfy the first element of this claim. First, she alleges "she was constantly underestimated, belittled and disrespected by her subordinates." Those allegations are not supported by details such as identities of the parties, the content of the statements, the nature of the actions, or dates, times, and places of the incidents. Such conclusory allegations are not facts and do not raise questions of fact.

Second, she alleges she was "discouraged from pumping breastmilk at work to the point that she was often engorged and in discomfort." Carroll claims that upon her return from maternity leave, Thompson complained to other individuals about her unavailability during times she was pumping breastmilk. She does not identify from whom she learned about the comments, the content of the comments, to whom the comments were made, when they were made, or in what context they were made. Thompson indicated in her deposition a need to be aware of Carroll's availability throughout the school day. Thompson indicated that Carroll's first week back after maternity leave, she had issues locating Carroll or reaching her by radio per school protocol. Carroll does not argue that turning off her radio and/or not responding to calls would not have been a violation of school protocol. She does not argue that Thompson did not need to know her whereabouts. Carroll stated that she never turned her radio off during school

hours, instead she claims she could not hear the radio during lunch. Thompson indicates that Carroll informed her that she would need to pump breast milk several times a day, but was not told when or for how long. Carroll does not argue that Thompson told her she could not pump her breastmilk.

Carroll's claim that "Thompson initiated an investigation by the highest levels of HR around Ms. Carroll's physiological need to pump breastmilk at work" is without sufficient evidentiary support. The record shows that Thompson spoke with her supervisors only for direction about how to manage Carroll's need to pump breastmilk. And, by Carroll's own admission, she and Thompson agreed to a plan for Carroll to pump breastmilk at specific times of the day. This plan was in place by October 15, 2017. Carroll had worked only five days before the plan was put in place. Carroll acknowledges that she did not utilize all of the time afforded to her by that plan.

Still, Carroll alleges "scrutiny on [her] pumping breastmilk" continued despite the plan being put in place. The evidence she relies on for this assertion is an exchange with office assistant Kristina Jaramillo, who asked her to ensure she covered her window only while pumping, as a safety precaution. Carroll argues this insinuated she was creating a safety issue by trying to have some privacy while pumping breastmilk. However, Thompson stated the window covering was part of the plan they had agreed to. And, the request by Jaramillo was made in an e-mail informing Carroll that she had removed the paper while another person used the office. School policy provided that door windows to rooms in the school were not allowed to be covered when students might be present. The

request to remove the paper from the window when it was not needed for privacy could not reasonably be inferred to mean that pumping breastmilk was itself a safety issue.

A reasonable person could not find that the District's response to her need to pump breastmilk constituted discrimination.

Third, she alleges, "Thompson surveilled and investigated Ms. Carroll's child care situation, a proxy for her testing Ms. Carroll's fitness as a mother." She provides no details to support this claim. And, the record shows only that Thompson told the office administrator to "let me know what time Ms. Carroll had gotten to work and if she noticed if [Carroll] left campus, because we had already had issues where she had left campus, and I couldn't always be in the office."

Carroll had made Thompson aware of her lack of childcare and its effect on her punctuality. The District's student school day for M.C. started later than Carroll's work day at Lakeridge. Thompson stated that Carroll would not be allowed to bring M.C. on campus to wait until his school start time. Carroll asserts the assistant principal at M.C.'s school offered to allow him to sit in her office and read until school started, but was told after a week she could no longer allow him to do so. On October 13, 2017, Carroll stated she left M.C. at home with her nanny and his younger brother. Monday and Tuesday of the following week, she took her son to school before coming to work. Thompson told her this was unacceptable and that she could not be late in order to take her son to school.

When Thompson spoke with Granger about Carroll bringing her son to work, Granger reminded her that teachers were not allowed to bring their children

to school in this manner and asserted that an administrator would not be able to either. Carroll does not argue that this was not the district's policy, or that on its face, it discriminated against mothers. She does not demonstrate that she was treated differently under the policy because of her race or status as a mother, than were other employees. She has not provided evidence that it was objectively abusive for her direct supervisor to monitor her work attendance and compliance with school district policy. The record does not raise a question of fact let alone state any facts in support of the claim that Thompson was testing Carroll's fitness as a mother.

Finally, Carroll raises the CPS report as harassing conduct. Carroll claims that Thompson did not follow District protocol in filing her report. District policies and procedures related to child abuse and neglect provide,

> When there is reasonable cause to believe that a student has suffered abuse or neglect, staff or the principal shall immediately contact the principal, nurse, or counselor, who will then contact the nearest office of the Child Protective Services (CPS) of the Department of Social and Health Services (DSHS). . . . Any doubt about the child's condition shall be resolved in favor of making the report.

"Inadequate supervision (unattended)" is listed as an indicator of physical neglect. Carroll does not dispute that she left her son in the car unattended. She asserts that leaving a child in a car unattended was not evidence of neglect. When Carroll's son knocked on the school door he was crying, having become scared while sitting alone in Carroll's car. A member of the staff observed an indicator of physical neglect and reported it to Thompson, the principal. Thompson was initially

disinclined to file a report and indicated that to Carroll. But, at the direction of her supervisor, Thompson contacted HR and was instructed to contact CPS.

Though Carroll notes Thompson did not personally observe signs of neglect, Washington law specifically requires Thompson to report instances of suspected child neglect on the basis of either firsthand or credible secondhand information. RCW 26.44.030(1)(a), (b)(i)-(iii). There is no evidence in the record that the District could have or would have responded differently on these facts if the employee was not a member of a protected class.

Carroll also alleges discriminatory motive is evidenced by the content of the CPS report. She asserts that, in the report, Thompson misstated that M.C. was left home alone the previous Friday, and that Carroll left M.C. in the car on two other days. Thompson states in her deposition that she believed Carroll had told her she left her son home alone. If this raises a question of fact about what is true, it still does not raise a material question of fact about whether Carroll's conduct was required to be reported to CPS. Thompson was legally obligated to file the report. Nothing establishes that its filing was discriminatory or properly considered as creating a hostile work environment. Nor could the content itself have supported a hostile work environment claim because Carroll did not learn of the full contents of the report or Thompson's deposition until after her employment ended. A reasonable person could not infer from the facts that filing the CPS report in this instance constituted discrimination. There is insufficient evidence to make a prima facie case for a hostile work environment claim.

The trial court did not err in granting the District's motion for summary judgment on her claim of hostile work environment.

III. Constructive Wrongful Termination

Constructive discharge occurs where "an employer deliberately makes an employee's working conditions intolerable, thereby forcing the employee to resign." Sneed v. Barna, 80 Wn. App. 843, 849, 912 P.2d 1035 (1996). The court asks whether "'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" Id. (quoting Stork v. Int'l Bazaar Inc., 54 Wn. App. 274, 287, 774 P.2d 22 (1989)).

Carroll relies on the existence of a hostile work environment and on an e-mail from Love to Tito to argue her constructive wrongful termination claim should not have been dismissed on summary judgment. Carroll failed to make a prima facie case of a hostile work environment. Carroll does not allege either District employee threatened to fire or otherwise discipline her prior to her resignation. And, the content of the e-mail was not known to her when she resigned.

On Monday, October 23, 2017, Carroll contacted Tito and scheduled a meeting to discuss the CPS report and her concerns about a hostile work environment. The meeting was scheduled to take place on October 27, 2017. She also contacted Love, president of the District's Principal Association, to ask her to represent her in that meeting. On October 26, 2017, Love told Carroll she could not represent her, but agreed to attend the meeting. Carroll cites to the October

27, 2017 e-mail exchange between Tito and Love canceling the scheduled meeting due to Carroll's resignation. In one e-mail, Love replied,

> You get HUGE points for this one. LOL. She was so FRIGHTENED OF YOU that she didn't want to face the TITO-MATOR (Terminator). LOL. She called me last night and I told her she better think clearly about that decision. I guess she didn't listen.

Carroll did not know the content of this e-mail prior to her resignation. It could not have contributed to her feeling constructively discharged.

The trial court did not err in granting the District's motion for summary judgment on her claim of constructive wrongful termination.

IV. Retaliation

To raise a retaliation claim, Carroll must show (1) she engaged in statutorily protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between her activity and the other person's adverse action. Currier v. Northland Servs., Inc., 182 Wn. App. 733, 742, 332 P.3d 1006 (2014). Proximity in time between the adverse action and the protected activity, along with evidence of satisfactory work performance, suggests an improper motive. Campbell v. State, 129 Wn. App. 10, 23, 118 P.3d 888 (2005). A viable retaliation claim requires a causal connection between the protected activity and the alleged retaliatory action. Boyd v. State, 187 Wn. App. 1, 11-12, 349 P.3d 864 (2015).

Here, Carroll asserts the protected activities were raising issues regarding disparate treatment of African-American students and her right to pump breastmilk under RCW 43.10.005. She asserts Thompson then created a hostile work

environment—“including her malicious CPS report”—soon after exercising those rights

Carroll relies on the creation of a hostile work environment as the adverse employment action. But, as discussed above, Carroll failed to establish there was a hostile work environment. And, as the District notes, to the extent that Carroll alleges “Thompson’s discriminatory animus was apparent even before she recommended that [Carroll] be hired,” that animus could not have been retaliatory. Thus, her claim lacks evidence of causation.

Carroll also raised the CPS report as a retaliatory adverse action. As discussed above, Thompson was directed to file the report by District personnel. Carroll has failed to establish that Thompson was not legally obligated to file the report. Carroll has failed to provide evidence that the personnel who directed Thompson to file the report did so in retaliation for her raising issues of disparate treatment or pumping breastmilk. Absent such proof, there is no causal connection between the protected activities and the alleged retaliatory action. [4]

The trial court did not err in granting the District’s motion for summary judgment on her retaliation claim.

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[4] Carroll also argues “the District’s vague evidentiary challenges should be considered on appeal.” She claims that below, the District argued certain evidence was inadmissible, which the trial court “noted.” It is not clear that the trial court excluded any documents objected to by the District. However, de novo review inclusive of these documents fails to establish sufficient evidence to support Carroll’s claims. Any error in excluding the documents would have been harmless.

V. Discrimination

A plaintiff establishes a prima facie case of disparate treatment in the workplace by providing evidence that (1) the defendant employer acted with a discriminatory motive and (2) the discriminatory motivation was a significant or substantial factor in an employment decision. Alonso, 178 Wn. App. at 744. A hostile work environment may constitute an adverse employment action. Id. at 746.

Carroll asserts that she was subjected to an adverse employment action in the form of a hostile work environment and constructive wrongful discharge. We have rejected her argument that a prima facie claim of either a hostile work environment or constructive wrongful discharge have been established.[5]

The trial court did not err in granting the District's motion for summary judgment on Carroll's discrimination claims.

VI. Adoption of a New Standard

The bulk of Carroll's briefing argues for the adoption of a new evidentiary standard in discrimination cases brought under WLAD. Citing several law review

[5] Without an adverse employment action, we need not proceed to the burden-shifting analysis. Carroll argues that she was "replaced by a lesser qualified Caucasian," asserting the burden then shifts to the District. Carolyn Hahn started in the assistant principal role on November 7, 2017. Carroll cites to an October 27, 2017, e-mail from Granger to several District employees detailing their intent to reach out to Hahn to "fill the [assistant principal] position at Lakeridge." The e-mail shows the District was eager to replace Carroll with Hahn, who did not have the same credentials as Carroll. But, according to the e-mail, the District had not yet reached out to Hahn the day after Carroll's resignation. That the District was eager to fill the opening created by Carroll's resignation is not proof she was constructively discharged. It does not matter who was hired after Carroll resigned if she was not constructively wrongfully discharged.

articles detailing how judicial understanding about reasonability may be informed by the identities of judges, she points to “[g]rowing social science research.”

Seeking direct review from our Supreme Court, she noted Washington recently adopted GR 37, which tasks trial court judges with evaluating allegations of racial bias in jury selection under an “objective observer” standard. Carroll argues adopting this standard for trial courts making determinations in discrimination cases would provide needed guidance to the trial court in how to determine a “reasonable inference” of discrimination.

The Supreme Court declined Carroll’s request for direct review. Carroll concedes the status of the law is to apply the standard as described above, arguing her claims are viable even under that standard. We decline to extend a new standard.

We affirm.

Appelwick, J.

WE CONCUR:

Mann, C.J.

Verellen, J.

MBE LAW GROUP PLLC

July 27, 2021 - 11:34 AM

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