No. 47305-4-II

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

BRITT EASTERLY, ELZY EDWARDS and CLIFFORD EVELYN,

Appellants,

v.

CLARK COUNTY,

Respondent.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

When two parties offer strikingly dissimilar and plausible narratives about various events and the motives behind them – particularly when many of the factual assertions are in direct contradiction – summary judgment is inappropriate.

B. REPLY ON STATEMENT OF THE CASE

The County's statement of the case, unsurprisingly, portrays the facts in the light most favorable to the County. Br. of Resp't at 2-21. The County does challenge some of Edwards' and Evelyn's factual particularities, but overall confirms the major events supporting each man's case.

A few of the County's statements do merit a response. First, the County admits that Hockett had documents indicating Edwards' race at the time he scheduled Edwards' interview on MLK day. Br. of Resp't at 5 n.2. However, the County claims that Hockett did not rely on the information in the file. *Id.* Thus, the County is admitting that there is a disputed issue of material fact on this point.

The County claims that, despite having taken the decision of hiring Edwards to Sherriff Dunegan after two of the Rule of Three panelists selected him, Edwards was not "selected" by the panel because the

decision was not unanimous. Br. of Resp't at 9 n.5. Below, Breanne Nelson stated that the procedure for the Rule of Three as follows:

> *If selected* by the Rule of Three panel, an applicant is then referred to the Sheriff for final consideration, as the Sheriff has final say on all officer hires. Selection by the Rule of Three *requires* a consensus recommendation by all three panelists.

CP 193 (emphasis added). Nelson testified that selection must be unanimous, and if selected, a candidate is then proposed to the Sherriff. Nelson's testimony contradicts her actions: if Edwards was not "selected," then Nelson should not have taken Edwards' candidacy to Sherriff Dunegan for final decision as she did. The contradiction between Nelson's words and actions creates a disputed issue of fact about whether the Rule of Three panel "selected" Edwards.

The County claims that Edwards "incorrectly states" that a Caucasian was hired rather than him, and that the statement is "wholly inaccurate." Br. of Resp't at 9. The County claims that the man hired was "DeCastro, a Hispanic applicant," citing CP 217-18 and 222.

The County's challenge regarding DeCastro's race is perplexing. It is unclear from the County's record citation where it gleans that DeCastro is Hispanic. CP 217-218 cites to the declaration of Sherriff Joseph Dunegan who says nothing whatsoever about DeCastro's race:

> Nelson told me that the split was due to background concerns related to a particular applicant named Edwards and that the Rule of Three panel could not decide between Edwards and another applicant named Decastro. *Nelson did not tell me the race of any applicant nor did I ask.*

CP 218. Nowhere in Dunegan's declaration does he state that DeCastro is Hispanic. CP 222 is simply the memo confirming DeCastro's hire, it also does not state his race. Even if there were evidence DeCastro were Hispanic rather than Caucasian, this would not change the fact that a member of a race different from Edwards race was hired instead.

C. ARGUMENT

(1) The Fact that the County Can Offer a Competing Explanation for Edwards' Disparate Treatment Is Not Grounds for Summary Judgment, It Means the Case Must Be Sent to the Jury

In his opening brief, Edwards argued that his claim for disparate treatment based on race was erroneously taken from the jury. Br. of Appellant at 16-22. He presented evidence that 1) he is a member of a protected class; 2) he was a qualified applicant; 3) he was not hired; and 4) the position remained open and the employer continued to seek other applicants of the plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) *holding modified on other grounds by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). He also argued that the

County failed to prove *as a matter of law* sufficient to prevail on summary judgment that race was not a motivating factor in the failure to hire him. Br. of Appellant at 22-26.

(a) The County Offers No Explanation for Why, If Edwards Was Not Qualified for the Position, the County Offered to Reinstate Him to the Process

The County challenges only one element of Edwards' *prima facie* case, arguing Edwards was not qualified for the position. Br. of Resp't at 24-28. Thus, if there is a disputed issue of material fact regarding Edwards' qualification, he has established a sufficient *prima facie* case to survive summary judgment. *See* RAP 10.3; *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *DeHeer v. Seattle Post–Intelligencer,* 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (party must raise arguments in brief, failure to raise arguments means court need not address issue).

The County argues that Edwards was "disqualified" from being a Custody Officer because of alleged dishonesty on his application. Br. of Resp't at 24-28. The County suggests that "honesty and truthfulness are minimum qualifications," and that any dishonest person is by definition disqualified for the position. *Id.* at 25. Thus, the County argues, summary judgment in the County's favor was appropriate. *Id.*

The County's claim that a person it deems dishonest is categorically "unqualified" to be a Custody Officer is patently untrue. Despite Tim Hockett's conclusion that Edwards was dishonest at the early stages of the hiring process, the County advanced him all the way to the final stages of the process. CP 1170, 1410. The County offers no explanation for wasting the presumably valuable time of four of its administrative staff in conducting a "Rule of Three" interview with a candidate who was not "minimally qualified." Br. of Resp't at 24-28.

Even more revelatory of the County's dishonesty on this point is the fact that, after an internal investigation revealed that Hockett treated another applicant substantially differently from Edwards, the County *invited Edwards be reinstated to the hiring process.* CP 456. This is not the action of an employer who considers an applicant to lack the "minimum qualification" for a position.

If the County considered Edwards unqualified, then he would have been rejected at the outset on that basis, and he certainly would not have been invited to reapply. The County's position on Edwards' qualification is unsustainable. Since the County challenges no other element of Edwards' *prima facie* case, he has established it, and summary judgment on that ground was inappropriate.

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

The County claims that Edwards has failed to "establish" that the County's proffered reasons for refusing to hire him were not pretextual. Br. of Resp't at 29-39. The County argues there is no evidence of "racial animus" on the part of the ultimate decision maker involved. *Id.* It averred that Edwards' claims were legally insufficient because undersheriff Dunegan, who actually rejected Edwards after the Rule of Three interview, made no direct statements of racial bias. *Id.* The County also states that Hockett and Nelson made no direct statements of racial bias, and thus summary judgment was appropriate. *Id.*

As a threshold matter, the County is wrong: Edwards was not obligated to "establish" the County's pretext in order to survive summary judgment. Br. of Resp't at 29. The question is whether Edwards offered sufficient evidence to allow a jury to conclude that the County's offered explanation is unworthy of credence. *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003); *Estevez v. Faculty Club of Univ. of Washington,* 129 Wn. App. 774, 800-01, 120 P.3d 579 (2005).

The County is wrong on another legal point: Edwards was also not obligated to "establish" by direct evidence that any of its employees possessed racial bias. Br. of Resp't at 29, 32, 36. An employee may

prove the employer's reasons were pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence.*" *Godwin v. Hunt Wesson, Inc.,* 150 F.3d 1217, 1220, 80 Fair Empl. Prac. Cas. (BNA) 890 (9th Cir. 1998) (emphasis added). Direct statements of racial bias are not required to take a case of race discrimination to a jury, circumstantial evidence is sufficient. *Sellsted v. Wash. Mut. Sav. Bank,* 69 Wn. App. 852, 860, 851 P.2d 716, *review denied,* 122 Wn.2d 1018, 863 P.2d 1352 (1993).

Framed by this incorrect understanding of Edwards' summary judgment burden, the County then engages in a valiant struggle to discount, downplay, dismiss, or justify Edwards' evidence. Br. of Resp't at 30-39. Although these evidentiary arguments may sway a jury, this Court may not weigh, dismiss or ignore evidence, as the County repeatedly invites it to do. *Id.* The County forgets that Edwards need simply raise a genuine issue of material fact that the County's explanation for refusing to hire him – "lack of qualification" – was unworthy of credence.[1]

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[1] Edwards asks this Court to take note that the very reason the County offers lack of qualification – is rendered "unworthy of credence" by the fact that the County invited Edwards to resume the process after the Hockett interview was discredited. CP 456. Thus, arguably, there was an issue of material fact about the credence of the County's reason even before Edwards submitted volumes of additional evidence.

There are numerous of examples of how the County inappropriately weighs and/or discounts Edwards' evidence, in violation of the summary judgment standard of taking all evidence in the light most favorable to Edwards:

- On the question of whether Hockett knew Edwards' race when he scheduled the Martin Luther King Day interview, the County claims that Edwards' race was evidenced on only "three pages of documents out of the hundreds of pages." Br. of Resp't at 30. This is a pure issue of weight; the quantity of documents that refer to his race is immaterial on summary judgment. The County also discounts one of the documents as being "historically very unreliable," alleging that Hockett did not "refer[]" to it. *Id.* This is a credibility question for the jury.

- The County claims that Hockett conducted background investigations "the same way for all applicants." Br. of Resp't at 32. The County also claims that Hockett rejected other Caucasian applicants. *Id.* at 33 n.25. This evidence directly contradicts the report of the County's own investigator, who found that Hockett treated Edwards differently from a Caucasian applicant. CP 1180-85. Even if the evidence is contradictory, this Court must ignore any evidence adverse to the non-moving party on summary judgment.

- The County claims that Edwards' background was "vastly worse" than Settell, a Caucasian applicant. Br. of Resp't at 34. This is pure weighing of evidence, which is a jury function.

- The County also claims that Settell is not a "valid comparator" to Edwards. *Id.* at 34 n.26. This directly contradicts the County's investigator, who said that the two applicants were "roughly similar." CP 1180.

- The County asks this Court to disregard all evidence that the County treated Edwards differently from Settell in terms of process ("In other words, Settell's application progression had

breaches in the process which favored him; Edwards' application progression also had process breaches, but they did not favor him"). CP 1183. The County claims there is no issue of fact on this point because its investigator concluded that HR employee Candy Arata simply made a "process mistake based upon her good faith belief that Edwards would not successfully pass a second background interview...." Again, Arata's motives are a fact for the jury; the investigator's opinion does not magically negate the other evidence of disparate treatment.

- The County says that some of Nelson's actions in the Rule of Three interview appeared to favor Edwards, and that this "is strong counter-evidence of discriminatory animus." Br. of Resp't at 36. This may be a legitimate argument to make to the jury; it is irrelevant on summary judgment.

- The County repeatedly points to the absence of direct evidence of "discriminatory animus" from Nelson. Br. of Resp't at 36-37. Direct evidence is not required to survive summary judgment.

- The County claims that "no other applicant or employee has ever accused Nelson of racial bias...." Br. of Resp't at 37. Not only is this claim, if true, irrelevant, but ironically if Edwards raised such evidence, the County would try to have it excluded as propensity evidence.

- The County invites this Court to weigh and disregard the testimony of Beltran, because "Beltran's participation on Rule of Three panels was limited...." Br. of Resp't at 38.

- Finally, the County claims that "the alleged impropriety of Nelson's actions was thoroughly debunked below," citing CP 1889-93. Br. of Resp't at 38. CP 1889-93 refers to pages from the County's reply pleading below. Those arguments are not evidence.

In short, the County's entire statement of the case and argument is a plea for this Court to weigh evidence and accept the County's description of

events as true, which it may not do. *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 459, 166 P.3d 807, 812 (2007).

In *Davis,* Division Three of this Court was confronted with similar arguments from an employer who had initial success on summary judgment. *Davis,* 140 Wn. App. at 812. The employee and employer offered competing rationales for various specific events. *Id.* For example, the employee said that he was held to a higher standard and disciplined more often than other employees. *Id.* There was conflicting evidence as to the tardiness of other employees, and of the employer's reaction. *Id.* This Court reversed summary judgment and remanded the case for trial. *Id.* at 813.

In short, because the County must ask this Court to weigh, disregard and discount evidence in order to support its position, it cannot prevail. A lack of direct evidence of racial bias is rare. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179, 23 P.3d 440 (2001), *as amended on denial of reconsideration* (July 17, 2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 226, 137 P.3d 844 (2006).

In this modern age, it is important to recognize that a lack of overtly racial statements does not evidence a lack of racial bias. WILLIAM Y. CHIN, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 Rutgers Race & L. Rev. 1,

15-16 (2015). It can be subtle, coded, and difficult to uncover. Of course, it is easier to recognize obvious, blatant racial bias than less-obvious, subtle bias. *Id.*; *see also, Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223 (1996) (purpose of disparate treatment claims is to allow inference of discriminatory animus because direct evidence rarely available).

The reality of covert bias is precisely why the *McDonnell-Douglass* burden shifting test was adopted by our Supreme Court: to allow a plaintiff to present an indirect case of discrimination to a jury in the *absence* of direct proof of racial animus. *Hill,* 142 Wn.2d at 180. As some academics studying the issue have noted: "One study revealed that judges evaluating workplace racial harassment claims tended to deem relevant only overtly racist behavior such as uttering racial slurs, but tend to disregard covert racist behavior such as exclusion from professional or work-related activities, social isolation, or other subtle stratagems." CHIN, 16 Rutgers Race & L. Rev. at 15.

The very fact that Edwards and the County have two competing, plausible explanations of the County's actions, backed by specific evidence, means the trial court erred. The County has not demonstrated that there is no genuine issue of material fact on Edwards' disparate treatment claim. The claim should be reinstated, and the case set for trial

by jury to resolve the competing explanations for Edwards' disparate treatment.

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

Regarding Evelyn's claims, the County engages in much the same exercise as it did with Edwards, asking this Court to reject, weigh, and discount evidence that favors Evelyn. Br. of Resp't at 40-60. The County repeatedly refers to incidences of hostile and disparate treatment as merely "minor" or "sporadic." *Id.* at 41, 43 n.36, 57, 58, 60. And although Evelyn actually produced *undisputed proof* of discriminatory animus, which the County seems to value above all else, the County asks this Court to give that evidence no credence. *Id.*

(a) Evelyn Presented Substantial Evidence of Disparate Treatment Motivated by Discriminatory Animus

In his opening brief, Evelyn presented evidence of direct discriminatory animus and disparate treatment by his supervisor, Jacqueline Batties. Br. of Appellant at 26-33. Batties stated that she does not like black men who date white women. CP 1483, 1651.

Despite having just finished trumpeting the importance of direct evidence of discriminatory animus in its attempt to defeat Edwards' claims, the County asks this Court to ignore such evidence with respect to

Evelyn's claims. Br. of Resp't at 40-48. Each of the County's arguments fails to prove that there are no disputed issues of fact in this case, in fact, they demonstrate just the opposite.

The County claims that this "single, isolated comment" is "insufficient" to establish discriminatory animus, citing *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 89, 98 P.3d 1222 (2004). *Id.* at 41. However, in *Domingo,* the Court noted that the "stray remark," which was a comment about an older employee not being a "spring chicken," was the *only* potential evidence of pretext against a mountain of evidence about the employee's violent behavior at work. *Domingo,* 124 Wn. App. at 90.

Here, the comment in question is much more directly imbued with discriminatory animus than the *Domingo* "spring chicken" comment, and there is no mistaking it for a joke or a contextual misunderstanding. Also, there is ample additional evidence that Batties treated Evelyn more harshly than other employees, which viewed in the light of her stated animus, creates an issue of fact for the jury regarding her motives. Finally, there are disputed issues of fact – documented in Evelyn's opening brief – regarding whether the "sexual harassment" investigation that led to Evelyn's dismissal was trumped up and manipulated as a basis to discharge him. Br. of Appellant at 11-14, 31-32. In *Domingo* there were

no such issues of fact, the employee simply complained that the employer did not "listen to her side of the story." *Domingo*, 124 Wn. App. at 89.

Next, the County claims that Batties' discriminatory statement should be discounted because "Batties knew Evelyn had a biracial daughter for almost 20 years" and yet sometimes gave Evelyn favorable performance reviews and promotions. Br. of Resp't at 41. This is a blatant invitation to weigh evidence, and this Court should disregard it. It is for the jury to decide if Evelyn's claims of discriminatory animus against Batties in light of these competing facts "defies logic," as the County claims.

Next, and perhaps most remarkably, the County claims that even if true, Batties' animus against black men dating white women is merely "associational discrimination," and is therefore not protected by the WLAD. Br. of Resp't 42-43. The County cites no legal authority for this proposition, and does not address the ample authority Evelyn cited in his opening brief supporting the proposition that this kind of discrimination is racial, not "associational," in nature. Br. of Appellant at 28-29.

Next, the County returns to its familiar pattern of asking this Court to weigh evidence and resolve conflicts. The County claims that Evelyn's declaration that Batties constantly questioned and undermined him should be ignored, because there is other evidence that "it was Evelyn who

disrespected and undermined Batties." Br. of Resp't at 45-46. It is difficult to conceive of a more direct dispute of fact in need of jury resolution. The County also avers that the declaration of Gerald Haynes, another County employee, should be disregarded as containing "inadmissible conclusory statements of fact imbued with hearsay and lacking foundation." Br. of Resp't at 47. This Court can review the declaration to see the inaccuracy of the County's characterization. CP 1080-81. Haynes discusses his personal, specific experiences of racial bias and discrimination against African-Americans at the County. *Id.*

The County claims that evidence the County tolerated sexual misconduct by Caucasian employees and allowed them to keep working or keep their pensions, but fired Evelyn, is immaterial because those employees were not of the exact same rank. Br. of Resp't at 48 (citing CP 1054). The County claims that a Chief and a custody officer are not valid comparators against Evelyn because they are not "similarly situated in all materials [sic] respects. *Id.*

It is unclear why the County thinks that rank is a material consideration in whether the County tolerates sexual misconduct by its employees. There is no evidence that the County allows more or less

improper sexual conduct based on rank.[2] *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 660 (9th Cir. 2002), *as amended* (July 18, 2002), does nothing to aid the County because there the "disparate treatment" was being laid off in the context of corporate downsizing, a situation in which rank would be material. Also, the two employees who received more favorable treatment are lower in rank *and* higher in rank than Evelyn. It would seem that rank was not material to the County's actions.

Also, deciding summary judgment based upon narrow questions of what specific qualities make a valid comparator, or whether the behavior is comparable, invades the province of the jury: "Turning summary judgment on such narrow questions as the distinction between the behavior of the comparator and [the plaintiff] defeats the fundamental concept of allowing discrimination claims to be decided on the merits." *Johnson*, 80 Wn. App. at 230.

Finally, the County asks this Court to weigh disputed issues of fact regarding whether the "investigation" of sexual harassment allegations against Evelyn were biased and used as a pretext for dismissing him. Br.

[2] The County seeks to characterize counsel's reference to the custody officer as a "commander" as some deceptive ploy, rather than a simple mistake. Br. of Resp't at 48 n.41. As the rank of the Caucasian employees is immaterial to the question of whether they should be allowed to commit sexual misconduct, mistakenly calling the officer a "commander" changes nothing about the legal analysis.

of Resp't at 49-52. Again, the County asks this Court to discredit evidence that favors Evelyn, and credit evidence that favors the County. *Id.* This, again, is contrary to the summary judgment standard.

For example, the County claims that there is "simply no evidence showing that an allegedly unbiased investigation would have been any different." *Id.* at 49. In addition to being a mystifying call for the production of non-existent evidence, the County asks this Court to perform the jury's function decide an issue of ultimate fact about whether the County would have dismissed Evelyn in the absence of racial bias.

Other examples of the County's request for this Court to do the jury's job are abundant, including: claiming that Arata could not have discriminated against Evelyn because she was a "fairly new employee," (Br. of Resp't at 50); arguing that Arata was not biased because she interviewed seventeen witnesses "out of fairness to Commander Evelyn," (*Id.*); and pointing out an "abundance of credible evidence" to defeat Evelyn's evidence, (*Id.* at 52).

Again, the County cites *Domingo* in support, and again, the County ignores the very different factual context. Br. of Resp't at 51. In *Domingo,* there were no allegations, let alone concrete evidence, of a biased investigation where the "investigator" was suggesting and feeding

false answers to interviewees. *Domingo,* 124 Wn. App. at 88-89. Also the County asks this Court to disregard all of Evelyn's evidence against Arata, including the declaration of an expert witness stating that Arata's investigation was a "witch hunt," that Arata is "blind to her own biases," and that the interviews process she undertook in Evelyn's case has been held up as "an exemplar of what *not* to do." CP 1065 (emphasis added).

The County also relies on *White v. State,* 131 Wn.2d 1, 19, 929 P.2d 396 (1997) for the proposition that entertaining evidence of a biased investigation to support a claim of pretext for disparate treatment is "merely an invitation for the court to act as a 'super personnel' department," and says our Supreme Court has rejected such invitations. Br. of Resp't at 51.

It is unclear whether the County actually read *White* closely, because it has no relevance here. *White* involved a claim of improper discipline *in the absence* of any actual impact on position, pay, rank, job classification, or benefits. *White,* 131 Wn.2d at 18-19. In other words, an employee has no legal claim for being subjected to discipline that does not adversely affect any tangible aspect of employment. *Id. White* does not stand for the proposition that Courts should stop entertaining disparate treatment claims ending in wrongful discharge as being merely an employer's exercise of "disciplinary authority."

As with Edwards' disparate treatment claim, the County asks this Court to weigh and ignore substantial evidence creating disputed issues of material fact regarding Evelyn's disparate treatment claim. This Court should reverse summary judgment and remand the claim for trial.

(b) Evelyn Presented Substantial Evidence that He Experienced a Hostile Work Environment

The County tries to deny that Caucasian County employees' tolerance of inmates shouting "nigger" at black officers created a hostile work environment for Evelyn, arguing that Evelyn stated he was not sure whether most of the "nigger" comments and subsequent laughter were directed at him. Br. of Resp't at 54-55. The County suggests that unless Evelyn testifies that he was personally the subject of each instance of being called "nigger" and having white officers laugh in response, the evidence is irrelevant to demonstrate an issue of fact on a hostile work environment. Br. of Resp't at 54-55.

Evelyn stated that he witnessed pervasive racial slurs from inmates, and witnessed Caucasian officers laughing in response. CP 1053. Evelyn described the behavior he witnessed as follows:

> [T]here's been times, okay, where inmates have called African-American officers the "N" word and, you know, the other - the white officers standing around, they all start laughing about it as well. They kind of join in and think it's funny as well, you know, so. You know, when a - a black officer sees that happening, you know, it's like - you know,

> it's kind of like a confused situation. You - here's your partners who's supposed to be supporting you, and then you have the inmate who is kind of like on the other side of the coin and he's calling you the "N" word, and everybody - and then the guys that's supposed to be your backup are laughing about it, then, you know, that - that leaves you in a dilemma. Now the officer - the black officer is in a dilemma. Well, what do I do, you know.

CP 1686. Evelyn also said that at least once, an inmate had called him "nigger" and spit on him. CP 1685.

Regardless of whether Caucasian officers were laughing at Evelyn's pain or the pain of other officers, witnessing this behavior directed at other black officers was sufficient to significantly alter Evelyn's employment conditions. *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 750, 315 P.3d 610 (2013). In *Alonso*, the employer raised the identical argument that the County raises here: that only racially discriminatory words or behavior directed to the complaining employee were relevant to establishing a hostile work environment claim. *Id.* This Court rejected that argument: "[A] defendant need not levy derogatory racially charged language directly at the plaintiff to subject the plaintiff to a hostile work environment and survive summary judgment." *Id.*

The County next avers that the "nigger" incidents are "not properly considerable" because black officers should expect this kind of "socially deviant behavior" from inmates. Br. of Resp't at 55-56.

The County misses the point. The crux of the hostile work environment claim here is not simply the shouting of "nigger" at black officers, it is the concurrent response by Caucasian officers, laughter and apparent enjoyment at witnessing the African-American officers being subjected to these racial slurs. The lack of support by co-workers, and their apparent delight at witnessing their fellow officers being subjected to the slurs, creates a hostile work environment beyond merely "deviant behavior" by inmates.

Next, the County claims that the racially discriminatory photo and message, the "Dove incident,"[3] should not be considered because "it is not evidence brought to the trial court's attention as part of Evelyn's hostile work environment claim below." Br. of Resp't at 56.

The County is simply wrong. Easterly did point to the racially charged "Dove incident" as evidence in support of his hostile work environment claim: "Easterly filed at least two HR complaints: he filed one specifically against Neal Karlsen, and he filed a second in 2008 about

[3] The employee who produced the photo of an African man in a grass skirt with a bone through his nose comparing the man to Evelyn's subordinate was named Jeff Dove.

various incidents, including the inappropriate posting of the photo by Jeff Dove...." CP 1128.

Finally, the County discounts other incidents of hostile and discriminatory behavior as "minor," says there must be evidence directly connecting each incident discriminatory animus, or invites this Court to disregard Evelyn's evidence and accept explanations more favorable to the County. Br. of Resp't at 57-60.

Evidence of a hostile work environment must be viewed in its totality; isolating and minimizing particular incidents, or requiring a directly discriminatory statement to accompany each one, is inappropriate. *Loeffelholz v. Univ. of Washington*, 175 Wn.2d 264, 276, 285 P.3d 854, 859 (2012); *Valentin-Almeyda v. Municipality Of Aguadilla,* 447 F.3d 85, 94 (1st Cir. 2006); *Demoret v. Zegarelli,* 451 F.3d 140, 149 (2d Cir. 2006); *Caver v. City of Trenton,* 420 F.3d 243, 262, (3d Cir. 2005) ("a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."); *Jennings v. University of North Carolina, at Chapel Hill,* 444 F.3d 255, 287 (4th Cir. 2006) (the severe or pervasive element of a hostile environment analysis "examines the totality of the circumstances"); *Cerros v. Steel Technologies, Inc.,* 398 F.3d 944, 950 (7th Cir. 2005) (number of circumstances of harassment is only one factor in the totality of the circumstances); *Baker v. John Morrell & Co.,* 382

F.3d 816, 828 (8th Cir. 2004) ("we review the totality of the circumstances in determining whether there is a hostile work environment"); *Freitag v. Ayers,* 468 F.3d 528, 539 (9th Cir. 2006) ("The third element requires us to consider the totality of the circumstances and whether the harassment was both objectively and subjectively abusive."); *Herrera v. Lufkin Industries, Inc.,* 474 F.3d 675 (10th Cir. 2007); *Bass v. Orange County,* 256 F.3d 1095, 1118 (11th Cir. 2001) ("While the other actions might not have individually risen to the level of adverse employment action under Title VII, when those actions are considered collectively, the total weight of them does constitute an adverse employment action"). The County cannot simply isolate each incident of hostile behavior and try to characterize it in the County's favor in order to defeat summary judgment.

Easterly produced sufficient evidence to meet his burden on summary judgment of demonstrating triable issues of fact on whether he was subjected to disparate treatment and/or submitted to a hostile work environment.

(3) The County Concedes that Neither Any Claim Nor Any Evidence on Appeal Is Time-Barred

In response to the County's arguments below, Evelyn and Edwards argued on appeal that neither their claims nor their evidence was barred by the statute of limitations. Br. of Appellant at 38-40.

The County concedes that there are no statute of limitations issues remaining in the case. Br. of Resp't at 60 n.54.

D. CONCLUSION

The County's response simply confirms the obvious: Evelyn and Edwards presented ample independent evidence to defeat summary judgment that cannot be discounted by this Court, either piecemeal or as a whole. The County may ask the jury to weigh, evaluate, discount, and overlook material evidence, this Court cannot. Only a jury can resolve the many-layered factual disputes and complexities each side has presented.

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

DATED this 16th day of December, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

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

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Original efiled with:
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Clerk's Office
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 16, 2015, at Seattle, Washington.

Matt J. Albers

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW

December 16, 2015 - 3:23 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 47305-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

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

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Reply Brief of Appellants

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