CASE NO. 97070-0

SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN CALCOTE,

Appellant,

vs.

CITY OF SEATTLE,

Respondent.

ANSWER OF RESPONDENT TO APPELLANT'S PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Kevin Calcote ("Mr. Calcote") never put any evidence into the record that he was denied overtime opportunities specifically between January 22 and March 5, 2012. Despite this evidentiary failure, he claims that the Court of Appeals erred in affirming summary judgment dismissal of his 2011 and 2012 disparate treatment claims for alleged denied overtime. The Court of Appeals did not err. Mr. Calcote's failure to support his claims with evidence, as well as his failure to offer any other justification for review of this issue, doom his petition. Respondent City of Seattle ("the City") respectfully requests that this Court deny review.

II. COUNTERSTATEMENT OF ISSUE FOR REVIEW

Was summary judgment on Mr. Calcote's claims of disparate treatment based on denied overtime between January 22, 2012 and March 5, 2012, properly granted when Mr. Calcote has offered no evidence that he was denied overtime during that specific six-week period?

III. COUNTERSTATEMENT OF THE CASE[1]

A. Mr. Calcote's Work as a Paving Crew Chief

Mr. Calcote worked as a paving crew chief of a concrete crew for

[1] The City has limited the facts included in this section to those it believes relevant to the narrow issue Mr. Calcote seeks to have reviewed.

the Seattle Department of Transportation's ("SDOT") Street Maintenance Division ("SMD"). CP 2. SDOT's paving crews conduct maintenance and construction field projects on Seattle's streets and sidewalks. CP 342. Paving crews and crew chiefs sometimes must work overtime; for example, some work, such as on arterials, near schools, or under bus trolley lines, must be done on weekends, and is therefore overtime work. CP 343.

B. Mr. Calcote Moves to PEMS, Then Back to Paving

On approximately March 6, 2012, Mr. Calcote moved to SMD's Pavement and Engineering Management Section ("PEMS"), where he performed a different body of work. *See* CP 2, 10, 345. Because PEMS work could be completed within business hours, Mr. Calcote did not work any PEMS overtime. CP 511. In 2014, Mr. Calcote requested to be moved back into paving as a crew chief, and in April 2015, after he had substantially completed a significant PEMS project, he returned to paving and took over as crew chief for the one remaining concrete crew. *See* CP 512, 851-52, 882.

Mr. Calcote asserted that, when he returned to paving in 2015, he did receive some overtime, but did not have as much as two non-African American crew chiefs. CP 600-01. He claimed he began to get more overtime after a new manager came on board and distributed overtime

more evenly. CP 603.

C. Mr. Calcote's Tort Claim, Lawsuit, and Appeal

On December 18, 2014, Mr. Calcote filed a tort claim. CP 111-13. He filed this lawsuit on March 23, 2015, alleging disparate treatment, retaliation, harassment, wrongful withholding of wages, negligent supervision, and loss of reputation. CP 1-14. The City moved for summary judgment on all claims, and the trial court granted the City's motion on June 19, 2017. CP 978-79.

Mr. Calcote appealed the dismissal of his claims for disparate treatment, retaliation, and harassment.[2] *See* Appellant's Opening Brief at 1-2. His disparate treatment claim was based on the following alleged adverse actions: 1) his reassignment to PEMS, 2) the failure to reclassify his position while he was at PEMS, and 3) denial of overtime opportunities. Div. I Op. at 13. The Court of Appeals affirmed summary judgment dismissal of claims based on the PEMS reassignment and the alleged failure to reclassify, and Mr. Calcote does not seek review on these issues. *Id*. at 13-18.

With respect to the denial of overtime opportunities, the Court of Appeals analyzed the claims dependent on the time period and

[2] He did not appeal the dismissal of his claims for wrongful withholding of wages, negligent supervision, and loss of reputation.

circumstances of the alleged denials. First, the Court of Appeals noted that the statute of limitations precluded disparate treatment claims based on actions that occurred before January 22, 2012. *Id*. at 18. The Court of Appeals accordingly held that "the trial court did not err by dismissing Calcote's disparate treatment claim to the extent it is based on denial of overtime opportunities in 2011." *Id*. at 19. Second, the Court of Appeals upheld dismissal of claims for lost overtime occurring while Mr. Calcote was at PEMS, finding that the City had produced a legitimate, non-discriminatory reason for the denial. *Id*. at 19-21. Third, the Court of Appeals found that disparate treatment claims based on denial of overtime after Mr. Calcote's return to street paving in 2015 could go forward, based on Mr. Calcote's assertions that when he first returned to paving in 2015 he was getting less overtime than some other crew chiefs, but that he began to get more after his new manager changed the overtime system.[3] *Id*. at 21-25. The parties have not sought review of the Court of Appeals' holdings on PEMS overtime and 2015 overtime.

Mr. Calcote filed a motion for reconsideration on one issue: whether there was a genuine issue of material fact as to whether he was

[3] The Court of Appeals also reversed the summary judgment dismissal of Mr. Calcote's harassment claim, and affirmed the summary judgment dismissal of his retaliation claim. Div. I Op. at 25-40. Neither of those claims are at issue in this petition for review.

unlawfully denied overtime opportunities from January 22, 2012, until March 5, 2012, when he moved to PEMS. At the Court of Appeals' request, the City filed a response brief. The Court of Appeals denied the motion for reconsideration, and Mr. Calcote now seeks review on this sole issue.

IV. ARGUMENT

A. The Statute of Limitations Bars Claims for Overtime Denied Prior to January 22, 2012.

The statute of limitations for discrimination claims under WLAD is three years. *Antonius v. King County*, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004). Mr. Calcote filed his complaint on March 23, 2015. CP 1. Because the tort claim tolled the limitations period for sixty days (*Castro v. Stanwood School Dist.*, 151 Wn.2d 221, 226, 86 P.3d 1166 (2004)), Mr. Calcote's disparate treatment claim must arise from actions occurring on or after January 22, 2012: three years and sixty days before he filed his complaint. The Court of Appeals correctly held that any claims for overtime denied prior to January 22, 2012, are time-barred, and Mr. Calcote does not dispute this holding.

B. Mr. Calcote Has Not Pointed to Any Evidence He Was Denied Overtime Opportunities During the Specific January 22-March 5, 2012 Time Period.

Mr. Calcote claims that the Court of Appeals erred by not

reversing summary judgment for overtime allegedly denied between January 22 and March 5, 2012. But Mr. Calcote never put any evidence into the record that the overtime opportunities he claims he was denied before he moved to PEMS occurred during the specific time period from January 22, 2012, through March 5, 2012, instead of during the earlier, time-barred period. In fact, while he stated in a declaration that he received less overtime than other crew chiefs when he first returned from PEMS in 2015 (CP 601), the record does not contain any such statement from Mr. Calcote with respect to the January 22 through March 5, 2012 period. Despite this evidentiary deficit, Mr. Calcote now asks this Court to accept review of this issue. Mr. Calcote has presented no compelling reason for this Court to do so, and his petition should be denied.

Mr. Calcote attempts to remedy this evidentiary omission by citing to several documents that he believes support his claim that he was denied overtime between January 22, 2012 and March 5, 2012. However, none of these documents provide evidence that denials occurred during this specific time period.

First, Mr. Calcote cites to the declaration of one of his fellow crew chiefs, Melissa Marangon, who stated that "[i]n 2011 and early 2012, Lorie would assign overtime related to my concrete projects to Jaime Francisco, the utility cut crew chief, or to the asphalt crew chief, Steve

Hoyos, instead of giving the overtime to Kevin, the other concrete crew chief." CP 585. However, Ms. Marangon's declaration does not contain any statement that Mr. Calcote was passed over for any overtime in the specific time period at issue: January 22 through March 5, 2012. It would be pure speculation to assume that there were specific overtime opportunities in this time period (as opposed to earlier in 2012) that Mr.Calcote was unlawfully denied. A party opposing summary judgment "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Second, Mr. Calcote cites to his interrogatory responses (CP 144, 146-48) and to materials he submitted to SDOT management in 2014 (CP 210-11, 262, 264) to support his claim of lost overtime between January 22 and March 5, 2012. Pet. for Rev. ("PFR") at 5, 14, 18. Again, these documents do not provide evidence that overtime opportunities were denied during the specific six-week period at issue. Mr. Calcote's interrogatory responses state only generally that he was denied overtime (CP 144) and that overtime was distributed unfairly from 2011 through 2014. CP 147, 148. Similarly, Mr. Calcote's documents submitted to management in 2014 assert only that Mr. Calcote was denied overtime and

that overtime was not distributed fairly (CP 210-11, 262, 264); the documents do not specify that these denials occurred between January 22 and March 5, 2012.[4]

Notably, the City raised this limitations period issue in its Response Brief on appeal. *See* Amended Brief of Respondent at 40-41 (disparate treatment claim based on pre-PEMS overtime time-barred, as Mr. Calcote "has not shown he was denied any paving overtime between January 22, 2012, and the PEMS move."). Yet Mr. Calcote failed to point to any competent evidence to dispute this point in his reply brief, nor did he otherwise address the argument. That is because no such evidence exists. The Court of Appeals' decision, therefore, was not in error.

C. Mr. Calcote Does Not Show How RAP 13.4's Requirements Are Met.

Mr. Calcote also argues that this Court should accept review because the Court of Appeals' decision in this matter conflicts with other Court of Appeals decisions and decisions of this Court, and because issues of public interest are involved.

[4] Mr. Calcote also cites to a portion of his summary judgment opposition brief (CP 527) for the proposition that Lorie Munger denied him overtime opportunities from June 2011 until March 2012. PFR at 6. The declaration paragraphs cited in support of this proposition, however, do not contain any evidence to support a claim that these denials occurred between January 22, 2012, and March 5, 2012.

But Mr. Calcote does not explain how this is so. He cites to several cases for the proposition that disparate treatment occurs when an employee is treated less favorably than similarly-situated employees not in the protected class. PFR at 8-9. He argues that the Court of Appeals' decision here conflicts with those cases because in this case the Court of Appeals disregarded evidence that he was treated less favorably than others during the January 22-March 5 time period. However, none of the cases cited by Mr. Calcote stand for the proposition that a plaintiff can survive summary judgment on a disparate treatment claim without specific evidence that the allegedly adverse actions occurred within the statutory limitations period. The Court of Appeals' opinion, therefore, does not conflict with existing case law.

Mr. Calcote also appears to invoke RAP 13.4(b)(4) by claiming that the Court of Appeals' decision negatively impacts the public interest in eradicating race discrimination. PFR at 10. Again, he does not show how dismissal of a disparate treatment claim for which a plaintiff has not produced sufficient evidence that an actionable adverse event occurred within the limitations period violates any public interest. Moreover, while the City does not dispute that unlawful discrimination is a matter of state concern (*see* RCW 49.60.010), the fact that the Court of Appeals ruled against a Washington Law Against Discrimination ("WLAD") plaintiff on

an issue cannot, in itself, be sufficient to warrant review under RAP 13.4(b)(4); otherwise, any losing WLAD plaintiff would meet the standard for review by this Court, regardless of the nature of the issue. Mr. Calcote has not demonstrated that this Court should accept review.

V. CONCLUSION

The lack of evidence of denied overtime during the January 22 through March 5, 2012 time period precludes Mr. Calcote's disparate treatment claim on this issue. For all of the foregoing reasons, review should be denied.

DATED this 31st day of May, 2019.

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CERTIFICATE OF E-FILING AND E-SERVICE

I certify that on this date I electronically filed the foregoing document with the Clerk of the Court via the Washington State Appellate Courts' Portal, which will send notice of filing to all counsel of record.

DATED this 31st day of May, 2019.

s/ Vanessa Haralson
VANESSA HARALSON

SEATTLE CITY ATTORNEY'S OFFICE

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