97070-0

NO. 77136-1

SUPREME COURT
OF THE STATE OF WASHINGTON
DIVISION I

KEVIN CALCOTE

Appellant/Plaintiff,

v.

CITY OF SEATTLE

Respondents/Defendants,

AMENDED PETITION FOR DISCRETIONARY REVIEW

Cecilia Cordova, WSBA # 30095
Pacific Alliance Law, PLLC
1420 5th Avenue. Suite 2200
Seattle, WA 98101
(206) 652-3592 Phone
(206) 652-3205 Fax
Attorneys for Appellant

TABLE OF CONTENTS

APPENDIX A

TABLE OF AUTHORITIES

Table of Cases

WASHINGTON STATE CASES **Pages**

STATUTES

REGULATIONS AND RULES

A. INTRODUCTION

The Appeals Court upheld the Trial Court's dismissal of the disparate treatment claim for the period of January 22, 2012 through March 5, 2012. Both the Trial Court and the Court of Appeals stated that claims made for periods on or after January 22, 2012 are timely made, so timeliness is not a grounds for dismissing this claim. The Trial Court dismissed this disparate treatment claim based on a failure to state a prima facie case, stating: that Calcote "failed to raise a reasonable inference of unlawful discrimination." (TR 38)

The Appeals Court disagreed with the Trial Court's analysis and held that the Trial Court erred in requiring "real evidence that Calcote's treatment was different based on race." (App 23) Further, the Appeals Court used this reasoning to reverse the Trial Court's decision to dismiss disparate treatment claims, based on the denial of overtime opportunities, for periods in 2015. (App 23-24) Nonetheless, the Appeals Court failed to apply this reasoning to the period January 22, 2012 through March 5, 2012 (the "Period at Issue") and subsequently upheld the dismissal of all disparate treatment claims outside of 2015.

Plaintiff believes that applying the same legal test used by the Appeals Court, for the 2015 period to the Period at Issue, should result in a reversal of the dismissal of the disparate claim, based on the denial of overtime opportunities for the Period at Issue. It appears the Appeals Court may have overlooked or misapprehended the facts for the period at issue.

B. IDENTITY OF PETITIONER

The petitioner is Plaintiff Kevin Calcote.

C. COURT OF APPEALS DECISION

On January 22, 2019, The Court of Appeals, Division I, affirmed the trial court's dismissal in part, reversed in part, and remanded for further proceedings. (App 1-40) On March 11, 2019, the Court of Appeals denied Calcote's Motions to Publish and for Reconsideration. (App. 41).

D. ISSUES PRESENTED FOR REVIEW

Whether plaintiff presented sufficient evidence establishing a prima facie case of disparate treatment and sufficient evidence that the proffered reason was pretext, for the denial of overtime opportunities from January 22, 2012-March 5, 2012, such that the motion for summary judgment should be denied? YES.

E. Statement of the Case

1. Calcote's Disparate Treatment 2012

It is undisputed that Calcote was the only Black Crew Chief in SDOT Paving (the "City"). **(**CP49-53,150, 155, 157, 596, 600, 601, 598, 844)

All asphalt, concrete and utility cut crew chiefs ("Paving Crew Chiefs") are similarly situated and can and do perform each others' work. (CP585-587, 815) Specifically, all Paving Crew Chiefs perform asphalt, utility cut and concrete work. (CP315) Utility Cut and Asphalt projects provided the majority of overtime opportunities for Paving Crew Chiefs, which opportunities were denied plaintiff. (CP262, 264, 343) Moreover, the utility cut projects were performed on weekends and were paid at doubletime. (CP816)

In June 2011, Munger became Calcote's manager until his transfer to PEMS March 6, 2012, then in 2015 when Calcote returns to Paving. (CP161, 209) "Lorie Munger supervised the Paving Crew Chiefs, including Calcote from approximately June 2011. (CP 585)

In 2011 and early 2012, while Calcote was in Paving, Munger instructed Marangon to give her concrete overtime projects to Francisco, the Utility Cut Crew Chief, to the Asphalt Crew Chief, Hoyos, or even to the out-of-class Crew Chief, Vanater, rather than to Calcote, the other concrete crew chief." (CP 585-586) From 2011-2015, Munger controlled

which crew chiefs worked overtime by project assignment. (CP 586, 766-767) Munger knew which projects would incur overtime by their location and type of project. (CP766-767) Under Munger's management in Paving, Calcote was not assigned projects with scheduled overtime and barely had enough work to keep his crew busy during regular work hours. (CP148-149)

In 2011, Calcote received emailed compliments and commendations from citizens, SDOT managers in other divisions, and in December 2011 from Peter Hahn, the SDOT Director. (CP290-299) The SDOT Director commented that SDOT did not receive a flood of compliments, so he forwarded the complimentary email of thanks, regarding Calcote's work, to SDOT managers. Id. Calcote's 2010, 2012 and 2013 performance evaluations, rated his performance as exceptional or fully performing. (CP243-247, 788-793, 794-798)

Twice in February 2012, Calcote met with Pratt, SDOT Director, to complain about the unfair treatment Calcote received from his managers, favoritism and discriminatory application of process and procedures, including for overtime. (CP606, 763) Calcote told Pratt that this is something he should look into and that Calcote could give him some more information. (CP 763) Pratt told Calcote he would look into it and follow up with Calcote, though Pratt never did. Id.

Instead of investigating Calcote's complaints, Pratt offered Calcote two jobs, both with little to no overtime opportunities. (CP 606) So, Calcote's access to overtime decreased significantly mid-2011, and then ceased altogether when he was transferred to PEMS March 6, 2012. (CP763)

After Calcote's second February 2012 meeting with Pratt, Calcote wrote a memo noting the complaints he attempted to discuss with Pratt, including unfair treatment by managers, being denied overtime on multiple occasions, even when he had funds to cover overtime in his budget, and not being considered for overtime to fill-in for a co-worker. (CP594, 606, 607, 776, 777) Calcote's notes from February 2012 state that the City did not fairly allocate overtime and Munger assigned projects based on her personal preference, which deprived Calcote of overtime wages. (CP144, 146-148)

2. Calcote Files Suit Against City for Employment Related Claims

On March 23, 2015, Calcote sued the City for various employment claims, including claims under the Washington Law Against Discrimination Act (WLAD), chapter 49.60 RCW, disparate treatment, hostile work environment and retaliation. (CP1, 11-12) In May 2017, the City moved for summary judgment on all claims made by Calcote. (CP154) Calcote's Response argued that "Munger … withheld overtime

opportunities from Calcote in June 2011- March 2012, then again in 2015, but did not deprive the non-Black Crew Chiefs of the same. (CP527) The City moved to strike Rwamashongye's declaration. (CP799) The trial court dismissed all of Calcote's claims and excluded Rwamashongye's declaration in its entirety. (CP978-979)

3. Munger Removed from Managing Paving Department

By 2016, Rwamashongye managed overtime so that it was assigned more equally to the crew chiefs, which significantly increased Calcote's income. (CP 772, 813-814) Rwamashongye put all projects on one master schedule, you could see which Crew Chief was on what project and balance the work and overtime so it was shared between Crew Chiefs. (CP813-814) In 2016, there were over 2400 utility cut restoration work orders, dating back to 2012, that had still not been completed or done. (CP816) Munger had previously assigned the utility cut work exclusively to Francisco. (CP837) Under Rwamashongye, Calcote is now performing utility cut work and asphalt work. (CP837, 839) No specialized training is needed to perform utility cut work and Calcote regularly performs utility cut work. (CP558) The 2400 open utility work orders evidence utility cut work, dating back to 2012, that was available for Kevin and his crew to work and which would be paid for by the utilities, which is outside of SDOT's budget. (CP816, 836-837) It is estimated that the open utility cut

work could take up to six years to complete if one work order were completed every day, 365 days/year. (CP836-837)

4. Court of Appeals Reverses the Trial Court in Part (App 1)

Calcote raised the following issue in the Court of Appeals: Whether Calcote established a prima facie case of Disparate Treatment under Antonius v. King Cty., 153 Wn.2d 256, 273, 103 P.3d 729, 738 (2004), by producing evidence that SDOT treated non-Black crew chiefs more favorably than Calcote, the only Black crew chief? (App 8)

The Court of Appeals held that any alleged adverse employment action must have occurred on or after January 22, 2012 to be timely. (App18) Further, to the extent Calcote's disparate treatment claim was based on the denial of overtime opportunities in 2011, then such claim was untimely. (App 18-19) However, the Court in its decision regarding disparate treatment denial of overtime opportunities, did not address the timely period of January 22, 2012 – March 5, 2012, while Calcote was working in Paving, but prior to Calcote's reassignment to PEMS.

To the extent that the disparate treatment claim is based on the City's alleged denial of overtime opportunities in 2015, the court held that because issues of material fact exist as to Calcote's disparate treatment claim, the trial court erred by dismissing that claim in its entirety. (App 1).

The Court agreed with Calcote that the trial court erred by dismissing Calcote's hostile work environment claim. (App 28) Further, the court noted that "Calcote's allegations of harassment center on Munger, who supervised Calcote in late 2011 and early 2012, before Calcote was reassigned to PEMS, and again after Calcote returned to Street Paving from PEMS in 2015. (App 28)

The Court of Appeals concluded that since the City only objected to parts of Rwamashongye's declaration then the trial court erred by striking his declaration in its entirety. (App 9, 21 n5, 23 n6, 24 n7)

F. Argument Why Review Should Be Accepted

1. The Court of Appeals' decision conflicts with decisions of the Court of Appeals and of this Court. RAP 13.4(b)(4)

Leaving the Court of Appeals decision as it now stands, would violate public policy as established in RCW 49.60.010, 49.60.030. Disparate treatment "is the most easily understood type of discrimination" and occurs when the plaintiff is treated less favorably than similarly situated employees not in the protected class. Crownover v. State DOT, 165 Wn.App. 131, 265 P.3d 971 (Div. 3 2011), review denied, 173 Wn.2d 1030, 274 P.3d 374 (2012). This Court, the Court of Appeals and the federal courts have consistently applied this test. Blackburn v. Dep't of Soc. & Health Servs., 186 Wn.2d 250, 258, 375 P.3d 1076, 1080 (2016);

Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 354 n.7, 172 P.3d 688, 696 (2007); Alonso v. Qwest Commc'ns Co., 178 Wn.App. 734, 743, 315 P.3d 610, 615 (2013); Shokri v. Boeing Co., 311 F. Supp. 3d 1204, 1212 (W.D. Wash. 2018); Raytheon Co. v. Hernandez, 540 U.S. 44, 52, 124 S. Ct. 513, 519 (2003).

The Court of Appeals opinion affirming the trial court's dismissal of Calcote's disparate treatment claim to the extent that overtime opportunities were withheld from January 22, 2012-March 5, 2012 conflicts with the decisions of this court, the Court of Appeals and federal courts. It did so by overlooking the facts presented for the time period of January 22, 2012-March 5, 2012, as it related to the denial of overtime opportunities. It conflicted with these decisions by disregarding the presented evidence that Calcote was treated less favorably, with respect to overtime opportunities from January 22, 2012-March 5, 2012, than the other crew chiefs, none of whom are in the protected class. (CP585-587) While the opinion is unpublished, has no precedential value and is not binding on any court, nonetheless, as an unpublished opinion of the Court of Appeals filed on or after March 1, 2013, it "may be cited as nonbinding authority, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." Karanjah v. Dep't of Soc. & Health Servs., 199 Wn.App. 903, 912, 401 P.3d 381, 388

(2017); Wash. GR 14.1. Despite being an unpublished decision, the decision to dismiss Calcote's disparate treatment claim as it relates to the withholding of overtime opportunities from January 22, 2012 – March 5, 2012, is inconsistent and in conflict with other decisions of the Court of Appeals, of this Court, and with the Court of Appeal's own decision that the trial court erred in dismissing Calcote's disparate treatment claim for the denial of overtime opportunities in 2015. (App 25) This conflict is sufficient to warrant review of the Court of Appeals' decision under RAP 13.4(b)(1) and (b)(2).

This case warrants review because the Court of Appeals' opinion negatively affects the public interest in eradicating race discrimination and failing to address nuanced racism is itself a suppression of civil rights. RCW49.60.010. "The right to be free from discrimination because of race … is recognized as and declared to be a civil right," and includes the right "to obtain and hold employment without discrimination. RCW49.60.030.

Furthermore, this case warrants review because disregarding disputed issues of fact injures the public policy underpinning the WLAD. "When interpreting WLAD, we are particularly mindful that "a plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority."" Jin Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171, 189 Wn.2d 607, 614, 404 P.3d 504,

508 (2017)(*citing* Marquis v. City of Spokane, 130 Wn.2d 97, 109, 922 P.2d 43 (1996)). WLAD's public policy of protecting freedom from race discrimination ensures "[t]he "right to obtain and hold employment without discrimination." RCW49.60.030(1)(a). The Court's failure to take notice of the withheld overtime opportunities from January 22, 2012 through March 5, 2012, undermines the public policy of eradicating race discrimination and inadvertently allows covert racism to persist.

2. Sufficient evidence to defeat Summary Judgment For Disparate Treatment

This court reviews summary judgment orders de novo. Mohr v. Grantham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). The court should have denied the motion for summary judgment for disparate treatment, because Calcote established a prima facie case of disparate treatment and presented evidence that "raised reasonable but competing inferences of both discrimination and nondiscrimination, [so] the trier of fact must determine the true motivation." Scrivener v. Clark Coll., 181 Wn.2d 439, 445, 334 P.3d 541, 545 (2014) (citing Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 90, 272 P.3d 865 (2012).

Summary judgment is inappropriate "where the evidence creates reasonable but competing inferences of both discrimination and nondiscrimination, a factual question for the jury exists." Johnson v. Dep't

of Soc. & Health Servs., 80 Wn.App. 212, 229, 907 P.2d 1223, 1233 (1996).

"The requisite degree of proof necessary to establish a prima facie case … is *minimal* and does not even need to rise to the level of a preponderance of the evidence." Fulton v. Dep't of Soc. & Health Servs., 169 Wn.App. 137, 152, 279 P.3d 500, 509 (2012) (quoting Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)).

Summary judgment is appropriate only when there is no genuine issue as to any material fact." Id.; CR 56(c). We consider all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Fulton v. Dep't of Soc. & Health Servs., 169 Wash. App. 137, 147, 279 P.3d 500, 506 (2012).

. "The nonmoving party must set forth specific facts to support its allegations and show a genuine issue of material fact." Loeffelholz v. Univ. of Wash., 175 Wn. 2d 264, 271, 285 P.3d 854, 857 (2012).

"[T]riable issues of fact exist if the record, viewed in the light most favorable to the plaintiff, presents enough circumstantial evidence to raise a reasonable inference of intentional discrimination." Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1320 (11th Cir. 2012). "[C]omparative evidence of systematically more favorable treatment toward similarly situated employees not sharing the protected

characteristic," and "employing the McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) burden-allocating technique, [raises] an inference of illegal motive." Loyd v. Phillips Bros., 25 F.3d 518, 522 (7th Cir. 1994). Here, the City's overtime policy and Munger's subjective assignment of projects evidences the City's systematic favorable treatment of the non-Black crew chiefs. (CP585-587)

3. Prima Facie Case

Calcote established a prima facie case of disparate Treatment, following the analysis of the Court of Appeals and by offering evidence of the following: that (1) he is a member of a protected class;(2) that he suffered a tangible adverse employment action (a change in compensation is an adverse employment action)(3) that the action occurred under circumstances that raise a reasonable inference of unlawful discrimination and (4) that he was doing satisfactory work. Marin v. King Cty., 194 Wn.App. 795, 808, 378 P.3d 203, 211 (2016).

4. Member of Protected Class and Tangible Employment Action

As stated above, Calcote, the only Black Crew Chief, is a member of a protected class. (CP157) Calcote and the nonprotected employees were doing substantially the same work (CP585-587, 815) Billings v. Town of Steilacoom, 2 Wn. App. 2d 1, 24, 408 P.3d 1123, 1135 (2017).

5. Adverse Employment Action Occurred Under Circumstances of Reasonable Inference of Unlawful Discrimination

For summary judgment purposes, Calcote has satisfied that the withholding of overtime from January 22, 2012 through March 6, 2012 occurred under circumstances inferring unlawful discrimination. McGinest v. GTE Serv Corp, 360 F.3d 1103, 1122 n. 17 (9th Cir. 2004); (CP585-587)

February 2012, Calcote wrote notes of being denied overtime on multiple occasions even when he had the funds in his budget, was not considered to fill in for a co-worker for overtime opportunities because overtime was not fairly distributed among Crew Chiefs. (CP210-211, 262, 264) The denial of overtime opportunities during this Period in Issue, is an adverse employment action, because it negatively impacts his compensation. Fonseca v. Sysco Food Servs. of Ariz., Inc., 374 F.3d 840, 847 (9th Cir. 2004).

Plaintiff need not show that protected status is the only factor or the main factor in the adverse employment action, or that "but for" the employee's protected status the adverse employment action would not have occurred. Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995); Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 491, 859 P.2d 26 (1993), opinion amended on other

grounds, 122 Wn.2d 483, 865 P.2d 507 (1994). By denying him overtime opportunities, Calcote was treated less favorably in the terms or conditions of his employment than similarly situated, nonprotected employees. (CP585-587)

6. Doing Satisfactory Work

Nominal evidence is sufficient to satisfy the element of satisfactory performance: Calcote's self-assessment; his performance evaluations in 2010, 2012 and 2013 (CP 58-62, 243-247, 788-793, 794-798); and compliments and commendations from the community and SDOT managers, including the SDOT Director (CP290-299), are sufficient to satisfy this element. Vee v. SCS L.L.C., No. C06-5518 RBL, 2007 U.S. Dist. LEXIS 70397, at *23-24 (W.D. Wash. Sep. 24, 2007) (citing Aragon v. Republic Silver State Disposal Inc., 292 F.3d 654, 660 (9th Cir. 2002).

Calcote's positive Performance Reviews in prior and subsequent years are indicative that City managers' beliefs and assessments of Calcote's performance are contrary to and dispute the unfavorable 2011 Performance Review for purposes of showing pretext. Watson v. Nationwide Ins. Co., 823 F.2d 360, 361-62 (9th Cir. 1987). It can be inferred from these reviews that Calcote's work was satisfactory during that time. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

7. Pretext

Washington courts recognize that racism often leaves no overt evidence, so the courts adopted the burden-shifting standard articulated by McDonnell Douglas to analyze discrimination cases arising under WLAD, Kastanis v. Educ. Emps. Credit Union, 122 Wn.2d 483, 490, 859 P.2d 26, 30 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). The plaintiff has the initial burden of establishing a prima facie case of racial discrimination. McDonnell Douglas, 411 U.S. at 802-803. The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. Id. The burden then shifts back to the employee to show pretext. Id.

"An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." Scrivener, 181 Wn.2d at 446-47. " An employee need not produce direct evidence to show pretext; circumstantial and inferential evidence can be sufficient." Billings v. Town of Steilacoom, 2 Wn.App. 2d 1, 24, 408 P.3d 1123, 1136 (2017). When there are competing inferences of discrimination in a case, then pretext is a

question for the trier of fact. Fell v. Spokane Transit Auth., 128 Wn.2d 618, 642, 911 P.2d 1319, 1331 (1996).

Calcote has presented sufficient evidence for a trier of fact to find that the City's proffered reasons are pretext.

The City argued: some paving crew chiefs must work overtime, such as on arterials and under bus lines, which must be done on weekends and is scheduled overtime (CP156, 344); greater efficiencies were achieved by using the crews for overtime that perform the work during regular hours under the overtime policy in effect at all time relevant to this lawsuit (CP156-157, 327-328, 333); Calcote presented direct evidence of pretext. Ms. Marangon, the other concrete chief, stated that from 2011 to early 2012, then again in 2015, Munger required Ms. Marangon to offer available concrete overtime to the Hoyos, the asphalt crew chief or to Francisco, the utilities cut crew chief, rather than to Calcote, the other concrete crew chief. (CP 585-587) Munger even required Marangon to offer the concrete overtime to Vanater, a laborer, rather than to Calcote. (CP 585-587) This is evidence of pretext.

Under the overtime policy, out-of-class employees are ineligible for overtime when a regular employee is available and does not decline the overtime opportunity. (CP334) Offering overtime to Vanater, an out-of-class crew chief when Calcote was available and did not decline the

opportunity, evidences pretext. (CP585-587) The City argues that scheduled utility cut overtime, on arterials or trolley lines, must be done by utility cut crew and asphalt arterial overtime be performed by asphalt crew. (CP156-157, 175-176, 342-343)

Calcote's Answers to interrogatories state: the City of Seattle's policy and SDOT's protocol to disburse overtime equitably among employees of the same class, like crew chiefs, but the City's uneven overtime allocation from 2011-2014 deprived him of wages. Id.; (CP144, 146, 147, 148) These satisfy the pretext prong by creating a genuine issue of fact whether the overtime policy was the City's actual reason for the providing other crew chiefs with more overtime opportunities than Calcote. Scrivener, 181 Wn.2d at 447. (CP556-557)

The City argues that even if the overtime claims for 2012, while Calcote was in paving, are not time-barred, that Calcote admits asphalt crew chiefs had the first opportunity at asphalt overtime, concrete crew chiefs had first opportunity at concrete OT and Francisco as the utility cut crew chief had the first opportunity at utility cut overtime, under the overtime policy. (CP175-176, 344) However, Marangon's testimony that concrete overtime work was withheld from Calcote in 2012, raises "a genuine issue of material fact with respect to the legitimacy or bona fides

of the City's articulated reason for its overtime decisions. Johnson, 80 Wn.App. at 229. (CP585-587)

G. CONCLUSION

Calcote has presented sufficient evidence of his claims to survive summary judgment. Haubry v. Snow**,** 106 Wn.App. 666, 676, 31 P.3d 1186, 1192 (2001). The Petition for review should be granted.

RESPECTFULLY SUBMITTED this 12th day of April, 2018.

Pacific Alliance Law, PLLC
Attorneys for Plaintiff

By s/Cecilia Cordova
Cecilia Cordova, WSBA# 30095
1420 5th Avenue, Ste 2200
Seattle, WA 98101
(206) 652-3592 Phone
(206) 299-0999 Fax

CERTIFICATE OF SERVICE

I certify that on April 10, 2019, I served by email the attached document on the following counsel to the parties to this proceeding:

COUNSEL FOR DEFENDANT

Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
Phone: 206-684-8230
FAX: 206-684-8284
Sarah Tilstra
sarah.tilstra@seattle.gov
Molly Daily
Molly.Daily@seattle.gov

With a copies to:

Danielle Tovar
danielle.tovar@seattle.gov

Vanessa Haralson
vanessa.haralson@seattle.gov

/s/ Cecilia A. Cordova

Cecilia A. Cordova, WSBA #30095

NO. 77136-1

SUPREME COURT
OF THE STATE OF WASHINGTON
DIVISION I

KEVIN CALCOTE

Appellant/Plaintiff,

v.

CITY OF SEATTLE

Respondents/Defendants,

APPENDIX

Cecilia Cordova, WSBA # 30095
Pacific Alliance Law, PLLC
1420 5th Avenue. Suite 2200
Seattle, WA 98101
(206) 652-3592 Phone
(206) 652-3205 Fax
Attorneys for Appellant

CONTENTS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEVIN M. CALCOTE, Appellant, v. CITY OF SEATTLE, d/b/a Seattle Department of Transportation, Respondent.	)	No. 77136-1-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2019

2019 JAN 22 AM 8:35

SMITH, J. — Kevin Calcote appeals the trial court's summary dismissal of his claims against the city of Seattle (City) for disparate treatment, retaliation, and hostile work environment. Because genuine issues of material fact exist as to Calcote's disparate treatment claim to the extent that it is based on the City's alleged denial of overtime opportunities in 2015, the trial court erred by dismissing that claim in its entirety. The trial court also erred by dismissing Calcote's hostile work environment claim because Calcote raised genuine issues of material fact with regard to that claim. But Calcote's retaliation claim was properly dismissed. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

Kevin Calcote is an African-American concrete crew chief in the Street Paving work group of the Seattle Department of Transportation's (SDOT) Street

Maintenance Division (SMD). Street Paving crews conduct maintenance and construction projects on Seattle's streets and sidewalks, and operate out of two SDOT facilities: Haller Lake in North Seattle and Charles Street in South Seattle In 2010, SMD began experiencing the financial repercussions of the 2008 recession. Accordingly, in June 2011, Steve Pratt, SMD's director, eliminated two out of five concrete crews—one at Haller Lake and one at Charles Street. Calcote's crew, which was located at Haller Lake, was not eliminated. But Madelene Puloka, Calcote's supervisor, was laid off. It is undisputed that following these layoffs, Calcote was the only African-American crew chief in Street Paving. After Puloka was laid off, Calcote reported to Lorie Munger.

In February 2012, Calcote met with Pratt to complain about Calcote's 2011 evaluation, which was less favorable than evaluations that he had received in the past Pratt testified via declaration that meanwhile, a paving manager had been moved from Haller Lake to Charles Street. As a result, the crews at Haller Lake had no on-site supervision. Pratt testified he decided to move Calcote and his crew to Charles Street, but before the move was implemented, SDOT's finance department directed him to make more cuts. Pratt then decided to disband Calcote's crew.

Pratt met with Calcote in February 2012 and offered him two options. One option was to move to a slightly lower-paying crew chief position in Maintenance Operations, another SMD work group Another option was for Calcote to keep his crew chief title and pay but move to SMD's Pavement and Engineering Management Section (PEMS) Calcote was ultimately reassigned to PEMS as of

March 6, 2012. While assigned to PEMS, Calcote worked no PEMS overtime. Calcote also did not work any Street Paving overtime while he was at PEMS, except in May 2014 when he filled in for Jamey Vanater, an asphalt crew chief, while Vanater was on leave.

In May or June 2014, while Calcote was still assigned to PEMS, he provided to Pratt, Evan Chinn (SDOT's director of human resources), and Calcote's then supervisor at PEMS, Elizabeth Sheldon (collectively HR) materials complaining about his treatment in 2011, his 2011 evaluation, and his reassignment from Street Paving to PEMS. At a subsequent meeting with HR, Calcote indicated that he wished to be reclassified as an associate civil engineer. Sheldon testified via declaration that she then had a conversation with Calcote about seeking reclassification and that Calcote ultimately did not pursue reclassification but requested to be moved back to Street Paving. Calcote returned to Street Paving as an active crew chief on March 15, 2015. Munger was again Calcote's supervisor there until Munger retired in December 2015.

On March 23, 2015, Calcote sued the City for wrongful withholding of wages, negligent supervision, and the following claims under the Washington Law Against Discrimination Act (WLAD), chapter 49.60 RCW. loss of reputation, disparate treatment, retaliation, and hostile work environment. In May 2017, the City moved for summary judgment on all of Calcote's claims. In support of his response to the City's motion, Calcote filed a lengthy declaration from Julius Rwamashongye, who joined Street Paving as a manager about three or four months after Calcote returned to Street Paving. The City moved to strike

Rwamashongye's declaration and provided the trial court an appendix setting forth specific objections to many but not all of the statements in Rwamashongye's declaration.

On the morning of the summary judgment hearing, Calcote moved the trial court under ER 201 to take judicial notice of SDOT's "Upward Mobility Manual," the City's Personnel Rules, and a number of documents related to the City's Race and Social Justice Initiative. The trial court denied Calcote's ER 201 request, granted the City's motion for summary judgment with respect to all of Calcote's claims, and excluded Rwamashongye's declaration in its entirety. Calcote appeals.

ANALYSIS

City's Motion To Strike

The City moves this court to strike from Calcote's reply brief all citations to and arguments relying on the following documents, which the trial court declined to take judicial notice of below. the SDOT Upward Mobility Manual and documents related to the City's Race and Social Justice Initiative (collectively, Excluded Documents). In response to the City's motion, Calcote requests this court accept the Excluded Documents as additional evidence on appeal. For the reasons that follow, we deny Calcote's request and grant the City's motion to strike.

As an initial matter, we may decline to consider arguments that rely on evidence that the trial court excluded where, as here, the appellant did not assign error to the court's exclusion. Bryant v Palmer Coking Coal Co , 86 Wn. App.

204, 221, 936 P.2d 1163 (1997). Calcote argues that we should disregard his technical failure to assign error to the trial court's exclusion of the Excluded Documents and exercise our discretion to consider this case on its merits. Because Calcote provided no argument and no citation to authority on the issue of whether the trial court erred by refusing to take judicial notice of the Excluded Documents, we decline to do so. See State v. Olson, 126 Wn 2d 315, 323, 893 P.2d 629 (1995) (discretion to consider a case on its merits despite technical error should be exercised "where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied").

Calcote also contends, relying on Maynard v. Sisters of Providence, 72 Wn. App. 878, 866 P.2d 1272 (1994), and State v Berg, 177 Wn. App. 119, 310 P.3d 866 (2013), rev'd, 181 Wn.2d 857, 337 P.3d 310 (2014), that we should consider the Excluded Documents as additional evidence. Calcote's reliance on these cases is misplaced. In Maynard, the party seeking to introduce additional evidence on appeal had filed a motion for reconsideration relying on that evidence. Maynard, 72 Wn. App. at 880. Here, by contrast, there was no motion for reconsideration relying on the Excluded Documents and, until Calcote filed his reply, no basis from which the City could know that Calcote would raise arguments relying on the Excluded Documents. And in Berg, the court considered arguments raised for the first time in a reply brief because the Washington Supreme Court decided a relevant case after the appellant filed his opening brief. Berg, 177 Wn. App. at 127 n.5. But here, no such intervening action occurred. Maynard and Berg are not persuasive.

Calcote next argues that it is appropriate for this court to take judicial notice of the Excluded Documents under ER 201. But Calcote does not provide any discussion as to whether the Excluded Documents satisfy the requirements of ER 201(b). Accordingly, we do not consider this argument Holland v City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.")

As a final matter, Calcote asserts "[t]he City has cited no authority supporting the proposition that this Court's review of additional evidence may not be considered at this stage, especially when this evidence replies to legal analysis and reasoning in the City's Response Brief." Calcote then urges us to accept the Excluded Documents as additional evidence to "serve the ends of justice." But RAP 9.11 governs this court's acceptance of additional evidence on appeal, and Calcote has neither discussed RAP 9.11 nor provided argument that the criteria therein have been satisfied. Furthermore, Calcote has not offered any explanation why allowing him to add new evidence to the record on appeal would serve the ends of justice in this case. Accordingly, we strike from Calcote's reply brief the citations to and arguments relying on the Excluded Documents.

Calcote's Request for Judicial Notice

Calcote moves this court under ER 201 and RAP 9.11 to accept into the record and take judicial notice of voluminous City overtime records that were not introduced into the record below. We decline to do so and deny Calcote's

motion.

As an initial matter, "[e]ven though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9 11 restricts appellate consideration of additional evidence on review." King County v Cent Puget Sound Growth Mgmt. Hr'gs Bd , 142 Wn.2d 543, 549 n.6, 14 P.3d 133 (2000) RAP 9.11(a) provides that this court

> may direct that additional evidence on the merits of the case be taken before the decision of a case on review if. (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11 allows supplementation of the record "only in extraordinary cases " E Fork Hills Rural Ass'n v. Clark County, 92 Wn. App. 838, 845, 965 P.2d 650 (1998). Each of the six requirements listed in RAP 9.11(a) must be satisfied. Schreiner v City of Spokane, 74 Wn. App. 617, 620-21, 874 P.2d 883 (1994).

Here, Calcote argues that the first requirement of RAP 9.11(a)—that additional proof of facts is needed to fairly resolve the issues on review—is satisfied because "the Court needs additional proof to determine whether the City's treatment of Mr. Calcote occurred under circumstances raising a reasonable inference of unlawful discrimination." But Calcote mischaracterizes the issue on review The issue on review is not whether the City's treatment of Calcote occurred under circumstances raising a reasonable inference of unlawful

discrimination, but whether the trial court erred in summarily dismissing Calcote's claim on the record before it. Although we review this issue de novo, de novo review does not mean that we hold a new evidentiary hearing or that the parties may build a new record on this court's review In re Disciplinary Proceedings Against Turco, 137 Wn.2d 227, 245-46, 970 P.2d 731 (1999) Accordingly, Calcote does not satisfy the first requirement of RAP 9.11(a).

Calcote also does not satisfy the third requirement of RAP 9.11(a)—that it is equitable to excuse his failure to present the evidence to the trial court. Calcote argues that this requirement is satisfied because the City produced the overtime records the Friday before the Monday morning hearing on the City's motion for summary judgment. But Calcote had been aware for some time of the potential import of the overtime records, noting below that he had been asking for the records for two years. Nonetheless, he made no effort to enter the records into evidence below or request a CR 56(f) continuance so that the records could be analyzed and presented to the trial court Calcote also did not move for reconsideration based on the overtime records so that if the trial court denied reconsideration, the records could have been considered here without the need for additional motions practice on appeal. Calcote does not satisfy the third requirement of RAP 9.11(a)

Because Calcote does not satisfy the first or third requirement of RAP 9.11(a) and because all requirements of RAP 9.11(a) must be satisfied, we need not address RAP 9.11(a)'s other requirements. We deny Calcote's request to accept the overtime records as additional evidence. We also decline, for the

reasons already discussed in this section, Calcote's alternate request to waive RAP 9.11(a)'s requirements under RAP 1.2 and RAP 18.8.

Exclusion of Rwamashongye Declaration

Calcote argues that the trial court erred by striking Rwamashongye's declaration in its entirety even though the City only objected to parts of the declaration. We agree

"A court cannot consider inadmissible evidence when ruling on a motion for summary judgment." Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) Additionally, under CR 56(e), "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Although a trial court's ruling on a motion to strike usually is reviewed for abuse of discretion, when a motion to strike is made in conjunction with a motion for summary judgment, the standard of review is de novo. Southwick v Seattle Police Officer John Doe #s 1-5, 145 Wn App. 292, 297, 186 P.3d 1089 (2008).

Here, much of Rwamashongye's declaration testimony concerns events that occurred before or while Calcote was assigned to PEMS, and Rwamashongye did not lay any foundation for his personal knowledge of those events.[1] Furthermore, several portions contain hearsay and are therefore

[1] We decline to consider Calcote's after-the-fact attempts to lay a foundation for Rwamashongye's personal knowledge, as these arguments are being raised for the first time on appeal. See RAP 9.12; Silverhawk, LLC v. KeyBank Nat'l Ass'n, 165 Wn. App. 258, 265, 268 P.3d 958 (2011) ("An

inadmissible under ER 802.[2] In any case, the majority of Rwamashongye's declaration, even to the extent admissible, consists of speculation, argumentative assertions, and rhetorical questions that are insufficient to raise genuine issues of material fact

That said, Calcote is correct that the City did not object to all parts of Rwamashongye's declaration. We have considered the declaration in its entirety and conclude that parts of it are based on Rwamashongye's personal knowledge and are neither inadmissible nor strictly speculative or argumentative. Accordingly, the trial court erred by striking those parts of the declaration To the extent that the admissible parts of Rwamashongye's declaration raise genuine issues of material fact with respect to Calcote's claims, they are cited in the discussion below.

Summary Dismissal of Employment Discrimination Claims

Calcote argues that the trial court erred by summarily dismissing his disparate treatment, retaliation, and hostile work environment claims.[3] For the reasons discussed below, we conclude that the trial court properly dismissed

---

argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.").

[2] Calcote attached an appendix as exhibit B to his opening brief. The appendix sets forth argument on the admissibility of Rwamashongye's declaration. Because the appendix is not properly before us, we do not consider it. RAP 10.3(a)(8) ("An appendix may not include materials not contained in the record on review without permission from the appellate court.").

[3] Calcote neither assigns error to nor provides argument regarding the trial court's summary dismissal of his other claims below; accordingly, we do not address those claims. Jackson v. Quality Loan Serv Corp , 186 Wn App. 838, 846, 347 P.3d 487 (2015) (claims are deemed waived when no error is assigned nor argument provided).

Calcote's retaliation claim. We also conclude that the trial court properly dismissed Calcote's disparate treatment claim except to the extent that claim is based on the alleged denial of overtime opportunities in 2015, after Calcote returned to Street Paving. Finally, we conclude that the trial court erred by summarily dismissing Calcote's hostile work environment claim because genuine issues of material fact remain as to that claim.

A. Standard of Review

This court reviews summary judgment orders de novo, viewing all evidence and reasonable inferences in the light most favorable to the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "[S]ummary judgment is appropriate where there is 'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012) (second alteration in original) (quoting CR 56(c)). Once the moving party shows there are no genuine issues of material fact, "[t]he nonmoving party may not rely on speculation, argumentative assertions, 'or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.'" Becker v. Wash. State Univ., 165 Wn. App. 235, 245-46, 266 P.3d 893 (2011) (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

B. Dismissal of Disparate Treatment Claim

In disparate treatment cases under WLAD, we apply the burden-shifting protocol developed by the United States Supreme Court in McDonnell Douglas Corp v Green, 411 U S. 792, 93 S. Ct. 1817, 36 L. Ed 2d 668 (1973) Kirby v City of Tacoma, 124 Wn. App. 454, 464, 98 P.3d 827 (2004). Under that protocol, Calcote bears the initial burden of establishing a prima facie case of disparate treatment. Kirby, 124 Wn. App. at 464. Although the elements of a prima facie case vary based on the relevant facts, the parties do not dispute that Calcote must demonstrate (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he was doing satisfactory work, and (4) the action occurred under circumstances that raise an inference of unlawful discrimination. See Marin v King County, 194 Wn. App. 795, 808-09, 378 P 3d 203 (2016). An adverse employment action means "'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" Marin, 194 Wn. App. at 808 (quoting Burlington Indus , Inc. v Ellerth, 524 U S. 742, 761, 118 S. Ct. 2257, 141 L. Ed 2d 633 (1998)). If Calcote fails to establish a prima facie case, the City is entitled to judgment as a matter of law. Kirby, 124 Wn. App at 464.

If Calcote makes a prima facie showing, the burden shifts to the City to show a legitimate, nondiscriminatory reason for the adverse employment action. Marin, 194 Wn. App. at 809. If the City provides such a reason, the burden shifts back to Calcote to show that the City's reason is a pretext for what in fact is a

discriminatory purpose. Marin, 194 Wn. App. at 809. Calcote may show pretext by offering sufficient evidence that the City's reason had no basis in fact, the City's reason was not really a motivating factor for its decision, the City's reason was not temporally connected to the adverse employment action, the City's reason was not a motivating factor in employment decisions for other employees in the same circumstances, or although the City's reason is legitimate, discrimination nevertheless was a substantial motivating factor. Scrivener v. Clark Coll., 181 Wn 2d 439, 447-48, 334 P.3d 541 (2014). If Calcote fails to make a showing of pretext, the City is entitled to judgment as a matter of law. Kirby, 124 Wn App. at 464.

Here, Calcote undisputedly is a member of a protected class. He bases his disparate treatment claim on the following alleged adverse employment actions: (1) his reassignment from Street Paving to PEMS, (2) the City's failure to reclassify him as an associate civil engineer while he was at PEMS and its alleged delay in transferring him back to Street Paving, and (3) the City's denial of overtime opportunities. We address the burden-shifting analysis for each of these alleged adverse employment actions below.

(1) Reassignment from Street Paving to PEMS

Assuming for purposes of argument that Calcote established a prima facie case of disparate treatment based on his 2012 reassignment from Street Paving to PEMS, the City has satisfied its burden to show a legitimate, nondiscriminatory reason for that reassignment, and Calcote has failed to raise a genuine issue of material fact as to pretext. Accordingly, we conclude that summary judgment

was proper to the extent that Calcote's disparate treatment claim was based on his reassignment to PEMS.

Specifically, Pratt, the former SMD director, testified in his declaration that in early 2012, there were plans already in place to move Calcote's crew from Haller Lake to Charles Street and that moving the other crew (an asphalt crew) was not an option due to its equipment, which could not be accommodated at Charles Street Pratt testified that this decision was also made to improve communications and scheduling between the concrete crews, which would all be located at Charles Street following the move. Pratt testified that before the move was implemented, he received a directive from SDOT finance to make more cuts and that there was insufficient funding for the three remaining concrete crews. He also testified that "[r]ather than lay off another crew, I thought I could save enough money by disbanding a crew and finding places for them on other crews or in other work groups." Pratt testified that he chose to disband and reassign the members of Calcote's crew because he had already decided to move that crew. In short, the City has satisfied its burden to proffer a legitimate, nondiscriminatory reason for disbanding Calcote's crew and reassigning Calcote.

Calcote has not raised a genuine issue of material fact as to whether the City's proffered reason is pretext for a discriminatory purpose Calcote argues that a genuine issue of material fact exists because the City provided no documentation of the early 2012 budget shortfall that led to Calcote's crew being disbanded. But Pratt provided sworn testimony that he was directed to make more cuts and that there was insufficient funding for three crews, and Calcote

has not presented any evidence that contradicts Pratt's sworn testimony. Accordingly, Calcote's argument is not persuasive. See Laguna v State, 146 Wn. App. 260, 266, 192 P.3d 374 (2008) (although court should not resolve issues of credibility at a summary judgment hearing, no issue of credibility exists unless party opposing summary judgment comes forward with evidence that contradicts or impeaches the movant's evidence on a material issue).

Calcote next argues that the City's evidence indicates only specialty and reimbursable work and utility cut work was drying up, and that members of Calcote's disbanded crew supplemented the other two concrete crews after Calcote's transfer. He argues that these facts call into question whether funding was actually insufficient for three concrete crews But Calcote mischaracterizes the record by suggesting the City only presented evidence that specific types of Street Paving work had dried up: Pratt's deposition testimony is clear that the construction business, in general, "was down to nothing." Furthermore, the fact that Calcote's crew members may have supplemented the two remaining concrete crews does not create a genuine issue of material fact as to whether a budget shortfall existed, particularly where Pratt also testified that most of Calcote's crew was moved to other crews with more sustainable sources of funding. Again, Calcote's arguments are unpersuasive.

Calcote also contends that because Vanater was promoted to crew chief shortly after Calcote was reassigned to PEMS, funding actually was not insufficient to support three concrete crews. But Calcote's assertion that Vanater "replaced" him is unpersuasive given that Calcote does not dispute that Vanater

was promoted to asphalt (not concrete) crew chief. Nor does Calcote dispute that because Vanater replaced Ray Gallagher, another crew chief, Vanater's promotion did not add a crew chief position. Vanater's promotion does not raise a genuine issue of material fact as to pretext.

Finally, Calcote argues that the City cannot explain the labor costs associated with allowing two crew chiefs to have out-of-class assistants, again suggesting that the 2012 budget shortfall was pretextual. But although Melissa Marangon, another concrete crew chief, stated in her declaration that it was "not unusual" for two of the crew chiefs to have out-of-class crew chiefs assisting them with certain tasks, that statement alone does not create a genuine issue of material fact as to whether a budget shortfall existed in early 2012.

For the reasons discussed above, Calcote has not raised a genuine issue of material fact as to whether the City's reason for reassigning him to PEMS was pretext for a discriminatory purpose. Accordingly, we affirm the trial court's dismissal of Calcote's disparate treatment to the extent it is based on Calcote's reassignment to PEMS.

(2) Failure To Reclassify

Calcote argues that the City's failure to reclassify him as an associate civil engineer while he was at PEMS also serves as a basis for his disparate treatment claim. He also contends that after he requested to be transferred back to Street Paving, the City delayed his move. For the reasons that follow, we disagree.

Sheldon, Calcote's PEMS supervisor, testified that she discussed

reclassification with Calcote and "explained to him that the employee or supervisor can request reclassification to a specific position, but the Seattle Department of Human Resources makes the decision, and may reclassify to a different position than the one requested, or not change anything at all." Sheldon also testified that she explained that the work Calcote was doing in PEMS was likely in the range of classifications that had hourly rates below Calcote's crew chief rate. She testified that Calcote ultimately did not pursue reclassification

Calcote does not put forth specific facts to rebut Sheldon's testimony, nor does he dispute that he did not pursue reclassification.[4] Instead, he attempts to recharacterize Sheldon's testimony by arguing that Sheldon was offering him a position with lower pay. But argumentative assertions do not create genuine issues of material fact Becker, 165 Wn. App. at 245-46.

As a final matter, we are not persuaded by Calcote's assertion that the City delayed his move back to Street Paving because Calcote admitted in his declaration that he agreed to stay in PEMS until he finished a pending project there. For the foregoing reasons, the trial court did not err by summarily dismissing Calcote's disparate treatment claim to the extent it was based on the

[4] At oral argument, Calcote argued that the City continued to seek candidates for the associate civil engineer position after Calcote and Sheldon discussed reclassification, relying on a copy of a job bulletin for an associate civil engineer position posted in July 2014. But again, Calcote does not dispute that he did not pursue reclassification. Furthermore, Sheldon testified that the job announced in the bulletin was different from the position held by Calcote while he was at PEMS, that a competitive process was used to hire for the position, and most notably, that Calcote did not apply for the position. Calcote did not dispute any of this testimony, and therefore his argument is not persuasive

City's alleged failure to reclassify him as an associate civil engineer and its alleged delay in transferring Calcote back to Street Paving.

(3) Denial of Overtime Opportunities

Calcote argues that the trial court erred by summarily dismissing his disparate treatment claim to the extent it is based on the alleged denial of overtime opportunities in 2011 (before Calcote was reassigned to PEMS), while he was assigned to PEMS, and after he returned to Street Paving in 2015 We conclude that Calcote's claim is time barred to the extent it is based on denial of overtime opportunities in 2011 and that Calcote has not established a genuine issue of material fact as to the denial of overtime opportunities while he was assigned to PEMS. But we agree that the trial court erred by summarily dismissing Calcote's disparate treatment claim to the extent it is based on the alleged denial of overtime opportunities in 2015.

a 2011 Overtime Opportunities

The statute of limitations for claims under WLAD is three years. Antonius v King County, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004). The limitations period is tolled during the mandatory 60-day waiting period under RCW 4.96.020 for claims against local governmental entities, which "adds 60 days to the end of the otherwise applicable statute of limitations." Castro v. Stanwood Sch Dist. No 401, 151 Wn 2d 221, 226, 86 P.3d 1166 (2004) Calcote does not dispute that for purposes of his disparate treatment claim, any alleged adverse employment action must have occurred on or after January 22, 2012, which is three years plus 60 days before he filed his complaint on March 23, 2015.

Accordingly, the trial court did not err by dismissing Calcote's disparate treatment claim to the extent it is based on the denial of overtime opportunities in 2011.

b. Street Paving Overtime Opportunities While at PEMS

Dismissal was also proper to the extent that Calcote's disparate treatment claim was based on the alleged denial of Street Paving overtime opportunities while Calcote was assigned to PEMS. Assuming for purposes of argument that Calcote established a prima facie case of disparate treatment based on the alleged denial of Street Paving overtime opportunities while Calcote was assigned to PEMS, the City has satisfied its burden to show a legitimate, nondiscriminatory reason for that denial. And Calcote has failed to raise a genuine issue of material fact as to pretext.

Specifically, the City produced evidence that under its overtime policy then in effect, scheduled overtime work would, for efficiency purposes, be performed by the crew that "actually perform[s] this body of work during regular hours." That policy also provides that to be considered eligible for a scheduled overtime opportunity, an employee must "[b]e assigned to the crew which is responsible for the work being performed." In short, the City's overtime policy was a legitimate, nondiscriminatory reason that Calcote did not receive Street Paving overtime while he was assigned to PEMS.

Calcote argues that there is evidence that he was eligible for overtime in Street Paving while he was assigned to PEMS because he worked Street Paving overtime in 2014 to cover for Vanater. But the fact that Calcote was given one overtime opportunity in 2014, without more, does not create a genuine issue of

material fact as to whether the overtime policy was pretextual with respect to the denial of other Street Paving overtime opportunities

Calcote also contends that the City cannot rely on the fact that Marangon (who also completed an assignment in PEMS) had no Street Paving overtime hours while she was assigned to PEMS, arguing that Marangon *chose* not to work more overtime hours. But Marangon's declaration indicates that the occasions when she chose not to work overtime occurred in 2011. Marangon was not assigned to PEMS until 2012 or 2013, so Calcote's argument is not persuasive.

Calcote next relies on his union's collective bargaining agreement (CBA) to argue that the overtime policy was a pretext for a discriminatory purpose. He argues that under the CBA, any scheduled Street Paving overtime should have been offered to him before it was offered to out-of-class crew chiefs. But the cited portion of the CBA provides that overtime work will be offered to regular employees before *temporary* employees are asked to work overtime, and that full-time crew chiefs have a right of first refusal for scheduled overtime within the work title, "provided that the overtime work is within their same work unit and shift and will not impact job continuation." Calcote does not allege that any temporary employee was offered overtime before it was offered to Calcote or that any scheduled Street Paving overtime was within Calcote's same work unit and shift and would not impact job continuation Calcote's argument is not persuasive.

Calcote also asserts that while he was assigned to PEMS, he should have had the first right of refusal under the CBA to be transferred back to Street

Paving as a crew chief before others were given an opportunity to work as "out of class" crew chiefs. But the only support Calcote points to for this argument is his own declaration stating his interpretation of his union contract's seniority rules. Calcote's assertion, which he does not support with relevant language from the CBA, is not sufficient to create a genuine issue of material fact on this matter.

Finally, Calcote contends that a genuine issue of material fact exists because Pratt admitted during his deposition that seniority is a basis for employment decisions. But Pratt did not make such an admission. He only explained that had Calcote been transferred to Charles Street in 2012, rather than reassigned to PEMS, Pratt would have had to reassign Marangon based on seniority. Meanwhile, both Pratt and Rwamashongye testified that management is not required to take seniority into account when transferring employees.[5] Therefore, this argument fails.

For the reasons above, we affirm the dismissal of Calcote's disparate treatment claim to the extent it is based on the alleged denial of Street Paving overtime opportunities while Calcote was assigned to PEMS

c 2015 Overtime Opportunities

Calcote argues that the alleged denial of overtime opportunities in 2015 also serves as a basis for his disparate treatment claim We agree and conclude that the trial court erred by summarily dismissing Calcote's disparate treatment claim to the extent that it is based on an alleged denial of Street Paving overtime

[5] The City did not object below to this portion (Clerk's Papers at 563) of Rwamashongye's declaration, and it is otherwise admissible. Accordingly, the trial court erred by excluding this portion of Rwamashongye's declaration.

opportunities in 2015, after Calcote returned to Street Paving from PEMS.

As an initial matter, the City asserts that the record does not support Calcote's claim that he was denied overtime in 2015 But Calcote testified in his declaration that in 2016, Rwamashongye began evening out overtime so that it was assigned more equally to the crew chiefs, significantly increasing Calcote's income. Viewed in the light most favorable to Calcote, this assertion raises an inference that in 2015, overtime could have been—but was not—evenly assigned and that Calcote's compensation was negatively affected as a result. Accordingly, for summary judgment purposes, we consider the alleged denial of overtime in 2015 an adverse employment action. Fonseca v. Sysco Food Servs. of Ariz , 374 F.3d 840, 847 (9th Cir. 2004) ("[A]n adverse employment action exists where an employer's action negatively affects its employee's compensation "); see also Antonius, 153 Wn.2d at 266 (Federal cases, while not binding, may be persuasive when they further the purposes and mandates of WLAD.).

To establish a prima facie case of disparate treatment on the basis of this alleged denial of overtime, Calcote must also show he was doing satisfactory work when he was denied overtime in 2015, after he returned to Street Paving. Although the City produced evidence of performance concerns regarding Calcote, "at the prima facie stage, [the plaintiff's] self-assessment of his performance is relevant," particularly where it is not the only evidence he presented. Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 660 (9th Cir. 2002). Here, Rwamashongye, who joined Street Paving in mid-2015,

testified in his declaration that Calcote "is as good as the other crew chiefs."[6] Accordingly, we conclude, for summary judgment purposes, that Calcote was doing satisfactory work in 2015.

The final element that Calcote must show to establish a prima facie case of disparate treatment is that the adverse employment action complained of occurred under circumstances that raise an inference of unlawful discrimination. To do so, Calcote must "point[ ] to . . . evidence that the [City] took an adverse action against him *because of his protected class*." See Marin, 194 Wn. App at 810 (emphasis added). This is where the trial court concluded that Calcote's disparate treatment claim failed, observing that the thrust of Calcote's allegations seemed to be that he was treated unfairly but that there was no "real evidence" his treatment was different on the basis of race.

Because "[t]he 'requisite degree of proof necessary to establish a prima facie case . . . is *minimal* and does not even need to rise to the level of a preponderance of the evidence,'" Fulton v Department of Social & Health Services, 169 Wn. App. 137, 152, 279 P.3d 500 (2012) (alteration in original) (quoting Wallis v J R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)), the trial court erred by requiring "real evidence" that Calcote's treatment was different based on race. It is undisputed that Calcote was the only African-American Street Paving crew chief in 2015, and he has presented evidence that overtime opportunities were withheld from him in 2015. Under these circumstances,

---

[6] The City did not object below to this portion (Clerk's Papers at 568) of Rwamashongye's declaration, and it is otherwise admissible. Accordingly, the trial court erred by excluding this portion of Rwamashongye's declaration.

Calcote has established, for summary judgment purposes, that this alleged withholding of overtime occurred under circumstances that raise an inference of unlawful discrimination Cf McGinest v GTE Serv Corp , 360 F.3d 1103, 1122 n.17 (9th Cir. 2004) (It is "widely recognized" that the test for a prima facie case is a flexible one.).

Because Calcote has established a prima facie case of disparate treatment based on the alleged denial of overtime opportunities in 2015, the burden shifts to the City to put forth a legitimate, nondiscriminatory reason for the denial. We conclude that although the City proffered a legitimate, nondiscriminatory reason for any denial of overtime opportunities after Calcote returned to Street Paving in 2015, Calcote has raised a genuine issue of material fact as to pretext. Specifically, the City argues that Calcote's claim is vague and unsupported and that Calcote admitted that under the overtime policy, others had the first opportunity at asphalt and utility cut overtime But Calcote stated in his declaration that Rwamashongye was able to even out the overtime in 2016 so that it was assigned to all of the crew chiefs more equally, resulting in a significant increase in Calcote's income. Rwamashongye also testified that when he joined Street Paving, he changed the system to balance the work and overtime.[7] Viewed in the light most favorable to Calcote, Rwamashongye's testimony creates a genuine issue of material fact as to whether the overtime policy was the actual reason for any overtime imbalance in 2015, before

[7] The City did not object below to this portion (Clerk's Papers at 556-57) of Rwamashongye's declaration, and it is otherwise admissible Accordingly, the trial court erred by excluding this portion of Rwamashongye's declaration.

Rwamashongye balanced out overtime.

In summary, we conclude that the trial court erred by dismissing Calcote's disparate treatment claim to the extent it is based on the denial of overtime opportunities in 2015, after Calcote returned to Street Paving. Otherwise, Calcote's disparate treatment claim was properly dismissed.

D. Dismissal of Retaliation Claim

Calcote argues that the trial court erred by summarily dismissing his retaliation claim. We disagree.

Retaliation claims are subject to the same burden-shifting scheme as disparate treatment claims Milligan v. Thompson, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). To establish a prima facie case of retaliation, Calcote must show that (1) he engaged in a statutorily protected activity, (2) the City took an adverse employment action against him, and (3) there is a causal link between the activity and the adverse action. Alonso v Qwest Commc'ns Co., 178 Wn App. 734, 753-54, 315 P.3d 610 (2013). In this context, "[a] general complaint about an employer's unfair conduct does not rise to the level of protected activity in a discrimination action under WLAD *absent some reference to the plaintiff's protected status*." Alonso, 178 Wn. App at 754 (emphasis added). Thus, for example, in Alonso, the Court of Appeals affirmed the dismissal of the plaintiff's retaliation claim where the plaintiff complained of corruption, mistreatment, and vulgar language, but did not express that those complaints were based on harassment based on his protected status. Alonso, 178 Wn. App. at 754. Similarly, in Graves v. Department of Game, 76 Wn. App. 705, 887 P.2d 424

(1994), the plaintiff's retaliation claim was properly dismissed because although she complained that her supervisor was not spending enough time with her, was not training her sufficiently, and was expecting too much of her, she did not suggest any discrimination based on her protected class. Graves, 76 Wn. App. at 712.

Here, Calcote contends that he engaged in a statutorily protected activity in February 2012 by complaining to Pratt about his poor performance review for 2011 and again in June 2014 when he met with HR. But Calcote did not indicate on either of those occasions that his complaints were based on his membership in a protected class. Specifically, Calcote testified by declaration that when he met with Pratt in 2012, he "complained about [his 2011] evaluation and [he] felt [he] was not being treated fairly." Calcote does not point to anything in the record indicating that he mentioned his protected status during this meeting Calcote argues in his opening brief that he expressed "concern[s] of favoritism and discriminatory application of SDOT's process and procedures" to Pratt in 2012, citing to his notes from his discussion with Pratt. But Calcote admitted at his deposition that when he met with Pratt in 2012, he did *not* express these concerns. Instead, the focus of the discussion was Calcote's 2011 evaluation. In short, Calcote's 2012 complaint to Pratt was not a statutorily protected activity.

Calcote's complaint to HR in 2014 also was not a statutorily protected activity because, again, Calcote does not point to anything in the record indicating that he referenced his protected class in that complaint Calcote argues that he referenced his protected class by giving a packet of information to

HR titled "Discriminatory Practices (Unfairness) Favoritism" that stated he was discriminated against, provided examples of City policies and procedures that were not followed, and listed personnel rules that he believed were violated. But Calcote did not reference his protected class in that packet, including on the page titled "Discriminatory Practices (Unfairness) Favoritism," which describes general unfair conduct. And Evan Chinn, who participated in the meeting, testified that "[a]t no time did Mr. Calcote allege any treatment was due to his race."

Calcote next contends, quoting Alonso, that he need not demonstrate that he referenced his protected status as long as he was complaining of activity "that he reasonably believed to be discriminatory." But the quoted text from Alonso does not mean that a plaintiff need not reference his protected status. Rather, it means that if he does, he need not *prove* that the discrimination he complained of was *unlawful* to establish a prima facie case of retaliation. See Short v. Battle Ground Sch. Dist., 169 Wn. App. 188, 205-06, 279 P.3d 902 (2012) (explaining that plaintiff need not prove her discrimination claim to prove she engaged in statutorily protected activity), overruled on other grounds, Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 325 P.3d 193 (2014). Calcote's reliance on Alonso is misplaced.

Because Calcote did not engage in statutorily protected activity when he complained of unfair conduct in 2012 and 2014, he did not establish a prima facie case of unlawful retaliation. Summary judgment was therefore proper, and we need not reach Calcote's arguments regarding the remaining elements of a

retaliation claim.[8]

E. Dismissal of Hostile Work Environment Claim

Calcote argues that the trial court erred by dismissing his hostile work environment claim. We agree.

To demonstrate a hostile work environment, Calcote must establish he suffered harassment that (1) was unwelcome, (2) affected the terms and conditions of employment, (3) was because Calcote was a member of a protected class, and (4) is imputable to the City. Loeffelholz v. Univ. of Wash., 175 Wn 2d 264, 275, 285 P.3d 854 (2012).

Here, Calcote's allegations of harassment center on Munger, who supervised Calcote in late 2011 and early 2012, before Calcote was reassigned to PEMS, and again after Calcote returned to Street Paving from PEMS. Specifically, Calcote alleges that Munger micromanaged him, requiring him to give detailed explanations about projects and explain his plans for completion from start to finish, while other crew chiefs were not required to provide this level of written detail. Calcote also alleges that Munger required Calcote to request resources in a burdensome manner not required of other crew chiefs, directing Calcote to coordinate through Munger, while other crew chiefs were allowed to coordinate among themselves without Munger's involvement Calcote alleges that Munger denied him use of certain equipment in both 2011 and 2015, slowing down the progress of his projects, and that Munger withheld specialized

[8] At oral argument, Calcote raised a number of arguments regarding this and other claims that were either not argued or not clearly articulated in his briefs. We decline to consider those arguments. RAP 12.1(a).

personnel from Calcote. Additionally, Calcote alleges that Munger withheld projects from him, forcing him to ask other departments for work to keep his crew busy.

The City does not dispute that the above-described conduct was unwelcome, and accordingly, we accept that it was. We address the remaining elements of Calcote's hostile work environment claim below.

(1) Effect on Terms and Conditions of Employment

The City argues that Calcote cannot show that Munger's conduct affected the terms and conditions of employment. We disagree.

To satisfy the "terms and conditions of employment" element, the harassment "must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." Glasgow v Georgia-Pac Corp , 103 Wn.2d 401, 406, 693 P 2d 708 (1985). "Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law." Glasgow, 103 Wn.2d at 406. Additionally, "[t]he conduct must be both objectively abusive and subjectively perceived as abusive by the victim." Clarke v Office of Att'y Gen , 133 Wn. App. 767, 787, 138 P.3d 144 (2006). That said, "[w]hether harassment is sufficiently severe or pervasive is a question of fact," and the court considers the totality of the circumstances, including "whether the conduct involved words alone or also included physical intimidation or humiliation, and whether the conduct interfered with the employee's work performance." Adams v Able Bldg Supply, Inc , 114 Wn App. 291, 296-97, 57 P.3d 280 (2002).

Here, Calcote testified by declaration that Munger withheld equipment from him on at least three occasions beginning in June 2011 and until Calcote was reassigned to PEMS Calcote also explained that these alleged actions dramatically slowed down the progress of his projects. Calcote testified that from June 2011 until he moved to PEMS, Munger withheld concrete finishers from him on at least two occasions. He testified that Munger ignored his requests for new projects, such that he had to seek out projects directly from project managers. He also testified that when he returned to Street Paving from PEMS, Munger continued to withhold equipment from him and that although other non-African-American crew chiefs had their own trailers, Calcote did not. Additionally, Marangon testified in her declaration that Munger would not make other crew chiefs do the things that Calcote was required to do, like "write reports explaining every little detail" or "go through [Munger] if we wanted to coordinate the use of equipment with another crew chief." Marangon also testified that after Calcote returned to Street Paving from PEMS, Munger continued to treat him the way she had before he was assigned to PEMS, including by withholding equipment. Additionally, Rwamashongye testified that when he joined Street Paving as a manager in mid-2015, he gave Munger the opportunity to rent a trailer for Calcote's crew, but she did not do so.[9] He also testified that he then pulled the equipment responsibility from Munger and took over that responsibility himself,

[9] The City did not object below to this portion (Clerk's Papers at 557) of Rwamashongye's declaration, and it is otherwise admissible. Accordingly, the trial court erred by excluding this portion of Rwamashongye's declaration

and that is how Calcote was able to get a trailer.[10] Calcote testified that being able to rent a trailer improved his crew's productivity. Based on the foregoing declaration testimony, we conclude that Calcote raised a genuine issue of material fact as to whether, under the totality of the circumstances, Munger's treatment of Calcote affected the terms and conditions of employment.

The City argues that the conduct alleged by Calcote is neither harassing nor objectively abusive, characterizing Calcote's complaints as "ordinary, non-abusive workplace complaints." The City relies on two unpublished federal court orders to support its argument. These orders are not binding, and we decline to address them. Cf. Antonius, 153 Wn.2d at 267 (suggesting that given WLAD's broad scope and the requirement that it be liberally construed, federal case law is only persuasive to the extent that it provides the potential for greater recovery).

The City also asserts that far more offensive conduct has not been found to create a hostile work environment, citing Davis v Fred's Appliance, Inc., 171 Wn App. 348, 287 P 3d 51 (2012) In that case, the Court of Appeals affirmed the summary dismissal of the plaintiff's hostile work environment claim, concluding that a manager's reference to the plaintiff as "Big Gay Al" three times in one week was, although highly inappropriate, only "casual, isolated, and trivial " Davis, 171 Wn. App at 362. Here, Calcote's claims are not based on isolated utterances, but rather on Munger's alleged conduct over a significant period of time. Furthermore, Calcote presented evidence that Munger's conduct

[10] The City did not object below to this portion (Clerk's Papers at 557) of Rwamashongye's declaration, and it is otherwise admissible. Accordingly, the trial court erred by excluding this portion of Rwamashongye's declaration.

was sufficiently pervasive to affect his day-to-day work, including his ability to obtain projects and timely complete them. Accordingly, Davis is distinguishable on its facts and does not control.

(2) Harassment Was Because Calcote Was a Member of a Protected Class

Calcote argues that he has raised a genuine issue of material fact as to whether Munger's harassment occurred because Calcote is a member of a protected class. We agree

In this context, the dispositive question is whether Calcote would have been subjected to Munger's alleged harassment if Calcote had not been African-American See Adams, 114 Wn. App. at 298 Here, Calcote presented evidence that he was required to provide detailed reporting to Munger regarding his projects and to coordinate through Munger to obtain equipment. Calcote also presented evidence that he was the only crew chief subjected to these requirements by Munger, and it is undisputed that at all times that Munger managed Calcote, Calcote was the only African-American crew chief. Accordingly, Calcote has presented sufficient evidence to raise a genuine issue of material fact with regard to this element.

The City contends that Calcote cannot demonstrate that Munger treated him differently because of his race because there is no evidence that Munger ever mentioned his race. In support of its argument, the City cites three unpublished federal court cases in which the plaintiff's hostile work environment claim was dismissed, in part because the plaintiff was not able to allege any harassment that referenced the plaintiff's membership in a protected class.

These cases are not binding. In any event, there was no allegation in any of these cases that the plaintiff was the *only* comparable employee who was a member of the relevant protected class Accordingly, the federal cases on which the City relies are not persuasive.

The City also points out that Calcote stated that the reason he believed Munger's conduct was connected to his race was because he felt he was doing satisfactory work, other crew chiefs did not receive the same treatment, and he could not think of any other reason. Citing Domingo v Boeing Employees' Credit Union, 124 Wn. App 71, 98 P.3d 1222 (2004), abrogated by Mikkelsen v Public Utility District No 1 of Kittitas County, 189 Wn.2d 516, 404 P.3d 464 (2017), the City argues that this is not enough to survive summary judgment. The City's reliance on Domingo is misplaced. First, there was no allegation in Domingo that the plaintiff was the only member of the relevant protected classes among her otherwise comparable coworkers Furthermore, in Domingo, the plaintiff's hostile work environment claim was based on an incident where a coworker hit her with a chair, but a supervisor who investigated the complaint viewed security footage of the incident and concluded that the act was unintentional. Domingo, 124 Wn. App. at 76, 83. Here, there is no dispute that Munger's conduct was—whether unlawful or not—deliberate Accordingly, Domingo does not control

The City next contends that Calcote cannot show that Munger's alleged harassment was based on Calcote's race because the conduct that Calcote complains of was also experienced by non-African-American crew chiefs Specifically, the City points out that Gallagher, another crew chief, was also a

frequent recipient of requests from Munger to explain his reasoning and outcomes, and received a poor review from Munger. The City cites a declaration from Marangon in which Marangon states she witnessed Munger's scrutiny of Gallagher and experienced similar scrutiny from Munger. But Marangon also testified in a later declaration that Munger "treated [Calcote] badly" and that "[t]he other crew chiefs didn't have to do the things that [Munger] would make [Calcote] do," including writing detailed reports and explaining "every little detail" and going through Munger to coordinate the use of equipment with another crew chief Viewed in the light most favorable to Calcote, Marangon's later declaration raises a genuine issue of material fact as to whether Munger's scrutiny of Calcote was harsher than her scrutiny of other crew chiefs, including Gallagher.

As a final matter, the City argues that Munger also denied resources to other crew chiefs, pointing out that Kyle Abrahamson, Calcote's Caucasian predecessor, did not have a trailer and had to coordinate with other crew chiefs. But Marangon's declaration referenced above raises an inference that although other crew chiefs could coordinate directly amongst each other for use of equipment, Calcote was required to go through Munger. Abrahamson's declaration, which indicates that he *was* able to coordinate directly with other crew chiefs, does not rebut this allegation. Additionally, Rwamashongye testified that even after he gave Munger the opportunity to rent a trailer for Calcote, Munger *still* failed to do so.[11] For these reasons, the City's arguments are not

[11] The City did not object below to this portion (Clerk's Papers at 557) of Rwamashongye's declaration, and it is otherwise admissible. Accordingly, the trial court erred by excluding this portion of Rwamashongye's declaration.

persuasive.

(3) Imputable to the City

The City argues that dismissal was proper because Munger's conduct is not imputable to the City. We disagree.

"Harassment is imputed to an employer when an owner, manager, partner, or corporate officer personally participates in the harassment." Alonso, 178 Wn. App at 752. "Managers are those whom the employer has given authority and power to affect the hours, wages, and working conditions of the employer's workers " Alonso, 178 Wn. App at 752. Here, the record includes evidence that Munger had the ability to move crew chiefs around to balance workloads and that Munger had the ability to assign overtime. There is also evidence in the record that until Rwamashongye took this responsibility away from Munger, Munger managed the crews' access to equipment.[12] Viewed in the light most favorable to Calcote, this evidence raises a genuine issue of material fact as to whether Munger qualified as a manager. See Alonso, 178 Wn. App. at 752-53 (concluding that individual was "manager" for summary judgment purposes where individual managed how employees would spend their workdays on projects and controlled overtime).

The City asserts that Munger was not a "manager" because she did not have authority to fire, promote, reassign, or impose discipline more severe than a warning. But Alonso makes clear that whether Munger was a "manager" is not

[12] The City did not object below to this portion (Clerk's Papers at 557) of Rwamashongye's declaration, and it is otherwise admissible. Accordingly, the trial court erred by excluding this portion of Rwamashongye's declaration.

determined by her official title, but rather by whether Munger "enjoyed the authority to affect the hours, wages, and working conditions" of employees. Alonso, 178 Wn App. at 752. Because the record indicates that Munger had the authority to affect Calcote's hours (via project assignments), wages (via overtime assignments), and working conditions (via access to equipment), Munger was a "manager" for purposes of summary judgment

That said, even though Munger was a "manager," the City may avoid liability if it proves that it "'exercised reasonable care to prevent and correct promptly any . . . harassing behavior,'" and Calcote "'failed to take advantage of any preventive or corrective opportunities provided by the [City].'" Sangster v. Albertson's, Inc., 99 Wn. App. 156, 165, 991 P.2d 674 (2000) (quoting Ellerth, 524 U.S. at 765; Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)). We conclude that Calcote has raised a genuine issue of material fact as to whether the City has successfully established this defense (the Faragher/Ellerth defense). Specifically, the City alleges that it exercised reasonable care to prevent and correct harassing behavior because its personnel rules prohibit race-based harassment and require reporting and investigating harassment, and because Calcote admitted that he received antiharassment training in 2011. But the City does not dispute Calcote's contention that the City failed to investigate Calcote's 2014 complaint regarding Munger's conduct and does not point to any evidence in the record that indicates that an investigation occurred. In other words, the City has, at best, established that it exercised reasonable care to *prevent* harassing behavior, but not that it

exercised reasonable care to prevent *and correct* that behavior.

The City argues that it is nonetheless eligible for the Faragher/Ellerth defense because Calcote's 2014 complaint does not mention race or harassment and is therefore too generalized to avoid application of the defense. But the City does not cite any binding authority that requires Calcote to specifically mention race or harassment to avoid application of the defense.[13]

The City also contends that Calcote failed to take advantage of corrective opportunities because he did not complain of the alleged harassment until 2014 and Munger committed no "'harassment'" after May 2014. But, as discussed, Calcote presented evidence that Munger's allegedly harassing conduct continued after Calcote returned to Street Paving in 2015. Accordingly, this argument is not persuasive.

(4) Timeliness

As a final matter, the City argues that conduct occurring before January 22, 2012, cannot be considered as part of the allegedly hostile work environment. We disagree.

In Antonius, our Supreme Court explained that in determining whether acts that fall outside of the limitations period may be considered together with

[13] The City cites an unpublished federal case, Setelius v. National Grid Electric Services LLC, No. 11-CV-5528 (MKB), 2014 WL 4773975 (E.D.N.Y. Sept. 24, 2014) (memorandum opinion and order). But Setelius is not binding and is in any event readily distinguishable. In that case, the plaintiff's complaints were vague in that she mentioned only that she was "'having problems'" with her supervisor and the way that she was being treated. Setelius, 2014 WL 4773975, at *2-3. Here, by contrast, Calcote's 2014 complaint to HR cited specific examples of the ways in which Calcote believed he was being treated unfairly.

timely acts as part of the same actionable hostile work environment, "[t]he acts must have some relationship to each other." Antonius, 153 Wn 2d at 256. In doing so, the court rejected, for purposes of hostile work environment claims, what was known as the "serial continuing violation" test, whereby discrete discriminatory acts that fell outside the limitations period could not be considered if the plaintiff was or should have been aware that he was being unlawfully discriminated against while the earlier acts were taking place. See Antonius, 153 Wn.2d at 263. Additionally, the court concluded that although there had been an approximately one-year gap in alleged harassing conduct while the plaintiff in Antonius was assigned to a different facility, "a gap, in and of itself, is not a reason to treat acts occurring before and after that gap as not constituting parts of the same unlawful employment practice." Antonius, 153 Wn.2d at 272 The court explained that "a 'court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period.'" Antonius, 153 Wn.2d at 271 (quoting Nat'l R R Passenger Corp v Morgan, 536 U S 101, 120, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)).

Here, we conclude that the pre-January 22, 2012, acts and the 2015 acts about which Calcote complains are all part of the same actionable hostile work environment claim. First, all of the acts that Calcote complains of are attributable to Munger, to whom Calcote reported both before he was reassigned to PEMS and after he returned to Street Paving. Accordingly, there is a clear relationship between the pre-January 22, 2012, acts and the 2015 acts. See Antonius, 153

Wn.2d at 271 ("[A]cts must have some relationship to each other to constitute part of the same hostile work environment claim ") To this end, Marangon testified that when Calcote returned to Street Paving in 2015, Munger "continued to treat [Calcote] the way she did before he was transferred to PEMS." In other words, even though Calcote's hostile work environment claim may not have been actionable had it been based on Munger's pre-January 22, 2012, conduct alone, the fact that this conduct *continued* after Calcote returned in 2015 indicates that both Munger's untimely conduct and her 2015 conduct were part of the same, unitary environment. Thus, Calcote's reassignment, like the gap discussed in Antonius, "is not a reason to treat acts occurring before and after that gap as not constituting parts of the same unlawful employment practice." Antonius, 153 Wn.2d at 272. Munger's pre-January 22, 2012, conduct and her 2015 conduct were part of the same allegedly hostile work environment.

The City argues, citing Crownover v State, 165 Wn. App 131, 265 P.3d 971 (2011), that due to the time gap while Calcote was assigned to PEMS, Munger's pre-January 22, 2012, conduct is not part of the same alleged hostile work environment as Munger's later conduct. But, as discussed, Antonius demonstrates that a gap alone is insufficient to defeat Calcote's claim, even when Calcote was assigned to a different work group during that gap Furthermore, in Crownover, the *only* event reported within the limitations period was a "facially innocuous" statement made by a supervisor about the members of a crew "spending quality time together in Pasco." Crownover, 165 Wn App. at 144-45. Here, by contrast, Calcote alleges that after he returned to Street

Paving, Munger continued to micromanage him and withhold equipment from him. This alleged conduct is not facially innocuous like the statement in Crownover. Accordingly, Crownover does not control.

For the reasons discussed above and viewing the evidence in the light most favorable to Calcote, genuine issues of material fact remain as to the elements of Calcote's hostile work environment claim Accordingly, the trial court erred by summarily dismissing that claim.

We affirm in part, reverse in part, and remand for further proceedings

WE CONCUR:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KEVIN M. CALCOTE, Appellant, v. CITY OF SEATTLE, d/b/a Seattle Department of Transportation, Respondent.	)	No. 77136-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Kevin M. Calcote has filed a motion for reconsideration of the opinion filed on January 22, 2019. Respondent City of Seattle has filed an answer to appellant's motion. The court has determined that appellant's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:

Smith, J.
Judge

FILED
3/11/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KEVIN M. CALCOTE, Appellant, v. CITY OF SEATTLE, d/b/a Seattle Department of Transportation, Respondent.	)	No. 77136-1-I ORDER DENYING MOTION TO PUBLISH OPINION

Appellant Kevin M. Calcote has filed a motion to publish the opinion filed on January 22, 2019. Respondent City of Seattle has not filed a response to appellant's motion. The court has determined that appellant's motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion to publish the opinion filed on January 22, 2019, is denied.

FOR THE COURT:

Smith, J.
Judge

PACIFIC ALLIANCE LAW, PLLC

April 10, 2019 - 6:39 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77136-1
Appellate Court Case Title:	Kevin Calcote, Appellant v. City of Seattle, Respondent
Superior Court Case Number:	15-2-06844-0

The following documents have been uploaded:

- 771361_Petition_for_Review_20190410183747D1551101_9850.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Calcote_PFR_041019.pdf

A copy of the uploaded files will be sent to:

- austin@cordovalawfirm.com
- calcote.allison@yahoo.com
- kim.fabel@seattle.gov
- kmcalc@msn.com
- molly.daily@seattle.gov
- sarah.tilstra@seattle.gov

Comments:

Corrected Copy

Sender Name: Cecilia Cordova - Email: cecilia@cordovalawfirm.com
Address:
1420 5TH AVE STE 2200
SEATTLE, WA, 98101-1346
Phone: 206-652-3592

Note: The Filing Id is 20190410183747D1551101