No. 99333-5

SUPREME COURT OF THE STATE OF WASHINGTON

ABUBACARR WAGGEH,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, and MIKE OBENLAND, MCC SUPERINTENDENT, and DANIEL W. WHITE, SUPERINTENDENT OF SPECIAL OFFENDER UNIT/INTENSIVE MANAGEMENT UNIT,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Defendants recognize that race discrimination has no place in the workplace. Nor should employers or courts tolerate retaliation against employees who engage in protected activity by complaining of race discrimination. The undisputed evidence in this case, however, does *not* establish that either discrimination or retaliation was a substantial factor in the discharge of Plaintiff Abubacarr Waggeh from his employment with the Department of Corrections (DOC). Rather, DOC terminated Waggeh due to serious violations of Department policies, including having sex with a woman under community supervision and improper comments and off-duty contact with numerous wives and girlfriends of offenders in DOC custody.

The Court of Appeals, like the trial court, correctly determined that Waggeh had not presented evidence of discrimination or retaliation sufficient to create a material question of fact as to those claims, and affirmed summary judgment for Defendants. *See Waggeh v. Dep't of Corr.*, No. 79876-6, slip. op. (Wash. Ct. App. Sept. 9, 2020) (unpublished). Of note, Waggeh's hostile work environment claim, which he voluntarily dismissed, has never been the subject of this appeal.

In affirming summary judgment, the Court of Appeals properly followed precedent and analyzed the specific evidence in the case to conclude that Waggeh had failed to meet his burden to demonstrate that the Department's legitimate, nondiscriminatory and nonretaliatory reason for terminating him from his employment was pretext. Waggeh's primary evidence of discrimination or retaliation was his own summary denials of

misconduct and a declaration of a corrections officer submitted in an entirely different case, having no connection to Waggeh's circumstances, and asserting unspecified racial animus at DOC. Notably, Waggeh submitted no evidence that the numerous independent reports of misconduct by specific corrections officers, inmates, inmates' wives and girlfriends, and independent medical professionals were motivated by racial animus.

Instead of addressing these glaring evidentiary deficiencies, Waggeh inappropriately attempts to resurrect his hostile work environment claim in the guise of a "cat's paw theory" of discrimination and retaliation that has never been part of this case.[1] Waggeh's cat's paw theory asserts that DOC supervisors with improper bias influenced an unbiased decision-maker to terminate his employment. Not only is this argument unpreserved, it is also without merit under the law and the facts.

Waggeh also invites this Court to accept review of his retaliation claim to adopt a new analysis that would collapse the three-step, *McDonnell Douglas* burden-shifting framework into a single step, the first. This Court should decline that invitation as unsupported by precedent. Because the Court of Appeals' unpublished opinion in this fact-intensive case does not conflict with an opinion of this Court or involve an issue of substantial public interest, review should be denied. *See* RAP 13.4(b)(1), (4).

[1] Following the Court of Appeals' unpublished opinion, Waggeh obtained new counsel of record who filed his motion for reconsideration and his petition for review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether Waggeh waived his "cat's paw theory" of liability and, if not, whether summary judgment was appropriate when Waggeh failed to present evidence that any specific DOC supervisor acted with discriminatory or retaliatory bias or influenced a DOC decision-maker such that the non-decisionmaker's animus was a substantial factor in the Department's decision to terminate his employment.

2. Whether summary judgment was appropriate on Waggeh's claim for discrimination and wrongful termination when the Department articulated a legitimate nondiscriminatory reason for his termination, and Waggeh failed to establish that the reason was pretextual.

3. Whether summary judgment was appropriate on Waggeh's retaliation claim when the Department articulated a legitimate, non-retaliatory reason for his termination, and Waggeh, by offering only evidence of proximity of time between protected activity and his termination, failed to establish that the reason was pretextual.

III. COUNTERSTATEMENT OF THE CASE

A. Waggeh's Poor Judgment and Performance History as a Corrections Officer Culminated in His Termination

The Court of Appeals provided an exhaustive summary of the facts underlying the issues in this case. *See Waggeh*, slip op. at 2-13. The following facts relevant to Plaintiff's petition are taken from that opinion.

Waggeh, during his nearly eight years as a corrections officer at the Monroe Correctional Complex, was frequently the subject of allegations of

misconduct by fellow officers, superiors, and inmates. *Id.* at 2. The early indications of problematic behavior began in 2010, five years before his ultimate termination. Between 2010 and 2011, the Department found Waggeh to have committed several infractions, including improper use of a state vehicle, unprofessional conduct toward offenders, failing to secure doors, refusing to cooperate with a female officer, and making inappropriate comments to female visitors. Despite Waggeh's wide variety of problems, the sergeant gave him the benefit of the doubt, concluding in his performance review: "Officer Waggeh has the ability and intelligence to turn himself around and become an asset to the Department." *Id.* at 4.

Waggeh, however, did not correct his path. In November 2010, he was reprimanded for ignoring directions and yelling at a superior, and being insubordinate, unprofessional, and disrespectful. *Id.* at 5. His behavior was witnessed by staff, visitors, and offenders. *Id.* In August 2011, the Department received a tip that Waggeh was bringing drugs into the facility. It investigated him and a drug-sniffing dog alerted to his pants pocket, utility belt, and center console of his vehicle, but no drugs were found. Waggeh could not explain why the dog had alerted. *Id.* at 5.

In February 2012, Waggeh's problems continued: a sergeant filed an incident report concerning Waggeh's poor work habits, leaving his post, failing to properly communicate about offender movements, and being "late quite frequently." Two months later, Waggeh informed the Department that his driver's license was suspended due to unpaid tickets. Rather than suspending him, the Department allowed Waggeh to continue working as

long as he did not operate state vehicles without a license. *Id.* at 5-6.

A few months later, in September 2012, an off-duty fellow corrections officer encountered a former inmate's wife. The wife said that Waggeh "was always trying to get her to go to a club in Seattle where he always went to." Previously, *another* inmate's wife had told the same officer that Waggeh had made a similar comment to her. After the first wife's allegation, the officer advised Waggeh that, "the worst thing he could do in visiting was to be hitting on the vis[i]tors and that he should have nothing at all to do with them." After receiving the second report of Waggeh's improper conduct with inmates' wives, the officer filed an incident report concerning Waggeh's conduct. *Id.* at 6.

In the next month, October 2012, two different sergeants reported more improper conduct by Waggeh, including a report from an offender that Waggeh made advances toward his wife in the visiting room. According to the offender, the comments made his wife uncomfortable and she refused to return as long as Waggeh was there. The sergeant contacted the offender's wife, who confirmed that Waggeh had made passes at her and made her uncomfortable. An additional incident report was filed. *Id.* at 6.

Yet the problems persisted. Waggeh received another reprimand in 2015, following an investigator's conclusion that Waggeh had improperly provided his cell phone to an offender's female visitor. Texts from Waggeh's phone number were found on the visitor's phone. The investigator also found that, on a separate occasion, Waggeh had taken a female visitor to the back storage area, alone behind a closed door at the

facility, and cut the hood off of her jacket because hoods are not allowed in the visit room. *Id.* at 7. The superintendent noted in his reprimand that he was "very concerned about [Waggeh's] judgment and ability to assess and address situations appropriately that occur with visitors and/or offenders during times of visiting." The superintendent made it clear that Waggeh severely damaged his faith in Waggeh's ability to meet his job requirements. The superintendent told Waggeh that the disciplinary action was intended to impress upon him the gravity of his misconduct and informed him that "Any further misconduct on your part may result in further disciplinary action, up to and including discharge." *Id.* at 7. As the direct result of his improper interactions with inmates' wives and girlfriends, Waggeh was permanently removed from supervising the visiting room to prevent further contact with visiting women. *Id.* at 7.

New allegations of misconduct arose in early 2015. Waggeh was accused of having sexual relations with a former female offender under DOC supervision. Waggeh also reportedly partied with another woman he met when she visited an offender. The Department also learned that Waggeh made inappropriate comments of a sexual nature to three different women visiting inmates, made threatening comments to an offender who had reported Waggeh's conduct, and retaliated against a woman who refused his sexual advances, by denying her access to visitation. *Id.* at 7-8.

Due to the complexity and scope of the allegations, the investigation was assigned to Workplace Investigation Services Unit investigator Michelle Torstvet. *Id.* at 8. After performing a thorough investigation that

included interviews with all of the parties, including Waggeh, Ms. Torstvet provided her investigation and findings to the superintendent. Waggeh does not claim that the investigator herself was biased. CP 573-79. Waggeh then filed an EEOC complaint in July 2015, while the investigation was pending, and he amended it in September 2015. *Waggeh*, slip op. at 2.

Also while the investigation was pending, and before his ultimate termination, a nurse at Harborview Medical Center reported that Waggeh appeared to be asleep while guarding an inmate there. *Id.* at 8-9. The nurse said that she was not sure if Waggeh was asleep, but that his eyes were closed during the ten minutes she was in the room, and he acted as if he did not know she was there. A fellow officer reported that the nurse had to call Waggeh's name three times to wake him. Waggeh denied the claims, alleging that the other officer was lying, and that the nurse would not have been able to tell if his eyes were closed because "[i]t's a big, dark room. I'm a black person. She would have to be closer to see." *Id.* at 9.

In August 2015, Waggeh received a sanction of a five percent pay reduction for three months because of the Harborview event. The superintendent told Waggeh: "You have caused significant harm to your credibility and the public we serve. You have embarrassed the Department. Your behavior has severely diminished my trust in you to honestly and effectively perform your duties." *Id.* at 9.

After reviewing Ms. Torstvet's thorough investigation and Waggeh's response, as well as his work history, length of service, and training and personnel file, the superintendent concluded that Waggeh

should be terminated. *Id.* at 9. On October 19, 2015, the Department terminated Waggeh's employment on the basis that Waggeh: (1) engaged in an off-duty sexual relationship with an offender on community supervision, (2) exchanged phone numbers and went out for drinks with a woman he had met while she was visiting an offender at the facility, and (3) failed to report his personal communications and relationships with known associates of an offender. *Id.* at 9-11.

The superintendent also cited Waggeh's failure to take responsibility for his actions, and that Waggeh's behaviors undermined the superintendent's confidence that Waggeh was capable of honestly and effectively performing his duties as a corrections officer. *Id.* at 9-11.

B. Procedural History

Waggeh filed suit, alleging claims of wrongful termination, retaliation, hostile work environment, discrimination, defamation, and breach of the duty of good faith and fair dealing. CP 757-71.

The Department moved for summary judgment on all claims. CP 110-15, 186-612. Waggeh responded to the Department's motion with two declarations in opposition. CP 121-85. The Department moved to strike much of Waggeh's evidence as inadmissible. CP 116-20. On January 23, 2019, the trial court struck some of the contested evidence, including a proposed settlement agreement and Employment Security findings. The court also entered summary judgment on all but one of the causes of action – the hostile work environment claim – which Waggeh later voluntarily dismissed. CP 80-95. Waggeh then moved for reconsideration, which the

trial court denied. CP 26-69.

Waggeh appealed the orders granting the Department summary judgment and denying him reconsideration to Division I. CP 12-13. The Department cross appealed. CP 1-2. The Court of Appeals affirmed the trial court, holding that Waggeh failed to demonstrate a genuine issue of material fact that the articulated legitimate reason for his termination was a pretext for discriminatory or retaliatory intent, even when viewing all facts in the light most favorable to him. *Waggeh*, slip op. at 2, 20-21. Beyond summary denials that he committed any misconduct, Waggeh presented no evidence that the superintendent did not, in good faith, believe that he had engaged in the misconduct and that the reasons for termination were thus pretextual.

Waggeh moved for reconsideration, attempting to assert new causes of action, including a "cat's paw" theory of liability. Division I denied the motion for reconsideration. *See* Order Denying Mot. for Recons. This Petition followed.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. This Appeal Raises Limited Issues under Controlling Precedent Related to the Department's Decision to Terminate Waggeh's Employment

From the start, the issues in this appeal have been properly limited to whether there is sufficient, competent evidence in the record to support Waggeh's claims of race discrimination and retaliation based on the Department's specific decision to terminate his employment. *Not* at issue is whether the Department subjected Waggeh to a hostile or racist work environment. Although Waggeh initially alleged a hostile work

environment theory of liability, he voluntarily dismissed that claim to appeal the trial court's dismissal of the claims that *are* the focus in this appeal: claims alleging disparate treatment and retaliation.

Now, in an attempt to demonstrate an issue of substantial public interest under RAP 13.4(b)(4), Waggeh tries to transform this case into a sweeping indictment of the Department to distract from his lengthy and documented history of sexual misconduct and inappropriate behavior towards the wives and girlfriends of offenders in his charge. It is not disputed that society at large must deal with problems of systemic racism, but the question here is whether Waggeh has demonstrated that either race discrimination or retaliation was a substantial factor in *his* termination. This Court should reject Waggeh's late effort to reframe this appeal into something it is not and never was.

B. The Court of Appeals' Opinion Does Not Conflict with Controlling Pretext Authority Requiring a Plaintiff to Demonstrate Discrimination Was a "Substantial Factor" in an Adverse Employment Action

In analyzing claims of discrimination and retaliation, Washington follows the *McDonnell Douglas* burden-shifting framework, where a plaintiff bears the initial burden to establish a prima facie case. *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty.*, 189 Wn.2d 516, 526-27, 404 P.3d 464 (2017) (discussing discrimination claims); *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411, 430 P.3d 229 (2018) (discussing retaliation claims). Under that framework, if plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises. *Mikkelsen*,

189 Wn.2d at 527. The burden then shifts to the defendant to "'articulate a legitimate, nondiscriminatory reason for the adverse employment action.'" *Id.* (quoting *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 446, 334 P.3d 541 (2014)). If the defendant meets its burden, the plaintiff must "produce sufficient evidence showing that the defendant's alleged nondiscriminatory reason for the adverse employment action was a pretext." *Id.* (citing same).

A plaintiff can meet this third prong of showing pretext by "'offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer.'" *Id*. (quoting *Scrivner*, 181 Wn. 2d at 446-47). However, an employee's subjective beliefs and assessments about their job performance are irrelevant. *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005); *see also Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 190 n.14, 23 P.3d 440 (2001) ("[C]ourts must not be used as a forum for appealing *lawful* employment decisions simply because employees disagree with them." (Emphasis in original.)); *White v. State*, 131 Wn.2d 1, 19-20, 929 P.2d 396, 408 (1997) ("[C]ourts are ill-equipped to act as super personnel agencies." (Internal quotation marks and citation omitted.)).

Here, the Court of Appeals applied the pretext standard as set forth in *Mikkelsen* and *Scrivner*. *Waggeh*, slip op. at 16-17. In affirming the trial court's decision to dismiss Waggeh's claims, it found that Waggeh had produced no *evidence* beyond his denials that his termination was based on

pretext. *Waggeh*, slip op at 20-21. Instead, Waggeh faults the Court of Appeals for considering the superintendent's good faith belief that Waggeh had engaged in misconduct in its analysis of pretext. *See* Petition 11-15. But it cannot reasonably be questioned that an employer's good faith can be a factor when determining whether the employer's stated reasons for termination were pretextual.

While *Scrivener* holds that a plaintiff need show only "that discrimination was a *substantial* factor in an adverse employment action, not the *only* motivating factor," a plaintiff must still do so by presenting "sufficient evidence." 181 Wn.2d at 446-47 (emphases added). Whether judgment for the employer is appropriate in a specific case depends on several factors, including: the strength of the employee's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that may be considered on a motion for judgment as a matter of law. *Hill*, 144 Wn.2d at 186. "[T]here will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* at 188-89 (quoting *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)).

Here, Waggeh did not meet his burden to produce sufficient, competent evidence that the Department's reason for his termination was pretextual and that discrimination or retaliation was a substantial factor in the decision to terminate his employment. He presented no evidence that

the Department, acting through the superintendent, did not, in good faith, believe that he had engaged in the alleged misconduct. Rather, Waggeh presented only his own testimony that he disagreed with the Department's conclusions, as well as vague and conclusory statements by Sgt. Hopkins about the work environment at Monroe Correctional Complex submitted in another case. CP 122, 125, 154-157, 161. Waggeh's testimony that he "is aware of other instances . . . of other black persons who had similar experiences," however, is not legally sufficient comparator evidence. *See* CP 122, 125. Similarly, the vague and conclusory statements made by Sgt. Hopkins are not legally sufficient comparator evidence. *See* CP 154-57.

Of note, Sgt. Hopkins' declaration was prepared and filed in a completely different lawsuit, for a woman who claimed to have been terminated due to sexism and racism. CP 154-61. There is no indication that the issues in that case are similar to those at issue here and, in fact, there is no indication that Sgt. Hopkins even knows Waggeh. Sgt. Hopkins' declaration does not create a question of material fact because it contains no specific factual information relating to Waggeh's circumstances.

In addition, Waggeh improperly cites to materials relating to his Employment Security hearing. *See* Petition 7; CP 145-49. The trial court granted Defendants' objection to consideration of the Employment Security findings, and Waggeh did not raise that issue on appeal. *See Waggeh*, slip op. at 11. In any event, the trial court's decision on Defendants' objection to that evidence was correct; such evidence is barred by RCW 50.32.097 and this Court should not consider it now.

None of the evidence presented by Waggeh was sufficient to create a genuine issue of material fact regarding pretext. *See Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 585, 459 P.3d 371, *review denied*, 195 Wn.2d 1031, 468 P.3d 616 (2020) (affirming summary judgment for the employer when the employee had "not presented any direct or indirect evidence that some reason other than the results of the investigation was a substantial motivating factor for her termination").

In taking his position that a showing of good faith on the part of the decision-maker can be offset by his own unsubstantiated statements that he was subject to discrimination, Waggeh is attempting to nullify a plaintiff's obligation to show pretext in disparate treatment and retaliation claims. That approach would allow every plaintiff to defeat a motion for summary judgment by simply denying the underlying misconduct and claiming that he or she perceived that discrimination was present. That is not the law in Washington. As recognized in *Hill*, only when the record contains reasonable but competing inferences of discrimination will the employee be entitled to a jury decision. 144 Wn.2d at 186. Otherwise, an entire category of discrimination cases would be effectively insulated from dispositive review. *Id.* at 185. There were no such reasonable but competing inferences of discrimination or retaliation in this case.

Waggeh also attempts to raise new theories of liability to this Court by arguing that Division I's opinion "leaves employees without a remedy for discrimination and retaliation at the hands of direct supervisors, co-workers, and, in the case of Black DOC officers, white inmates." Petition

14-15. Waggeh contends that the decision precludes a remedy "even if a jury could reasonably find that the accusations were tainted by racist or retaliatory motives of Waggeh's supervisors, his co-workers, and DOC inmates." *Id.* at 15. Neither assertion by Waggeh is correct.

The Court of Appeals' opinion in this case was necessarily limited by the claims, issues, and arguments properly raised before it. Washington law recognizes at least two theories of liability in the discrimination and retaliation context when allegations are made related to the animus of non-decisionmakers who are supervisors, co-workers, or third parties. Those theories are (1) hostile work environment claims, *see Blackburn v. State*, 186 Wn.2d 250, 260, 375 P.3d 1076 (2016);[2] and (2) "cat's paw" liability claims, *see Boyd v. State, Dep't of Soc. & Health Servs.*, 187 Wn. App. 1, 6 n.1, 349 P.3d 864, (2015). *Neither* theory was at issue in this appeal and, therefore, *neither* theory was addressed by Division I in its opinion.

First, Waggeh appears to vaguely argue that his work environment was hostile and, therefore, the Department cannot obtain a summary judgment

[2] To establish a hostile work environment claim, a plaintiff must show that the harassment "(1) was unwelcome, (2) was because of a protected characteristic, (3) affected the terms or conditions of employment, and (4) is imputable to the employer." *Blackburn*, 186 Wn.2d at 260 (citing *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985)). An employer will be responsible for harassment of the plaintiff by supervisors, coworkers, or third-party nonemployees if the employer "(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *LaRose v. King Cnty.*, 8 Wn. App. 2d 90, 111, 437 P.3d (2019) (quoting *Glasgow*, 103 Wn.2d at 407).

motion, but he then voluntarily dismissed that claim. Thus, his hostile work environment claim is not at issue here. While Waggeh cannot proceed on that claim, it remains a theory of liability available to other plaintiffs who can present sufficient prima facie evidence to support such a claim.

Next, Waggeh raises an argument of possible "cat's paw" or subordinate bias liability. That claim should be rejected. "Under the cat's paw theory, the animus of a non-decision-maker who has a singular influence may be imputed to the decision-maker." *Boyd*, 187 Wn. App. at 6 n.1 (citing *Staub v. Proctor Hosp.*, 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011)). A plaintiff can rely on the cat's paw or subordinate bias theory where he presents evidence that a supervisor's animus was a substantial factor in the employer's decision to discipline the plaintiff. *Id.* at 6. Subordinate bias liability recognizes that "it does not matter whether the subordinate[ ] personally 'pull[s] the trigger' on the adverse employment decision; the subordinate's animus sets in motion the events that culminate in the adverse employment action." *City of Vancouver v. State Pub. Emp. Rels. Comm'n*, 180 Wn. App. 333, 351, 325 P.3d 213 (2014) (internal quotation marks and citation omitted).

> Because the employer has delegated power or influence over employment decisions to the subordinate, any wrongful conduct on the subordinate's part occurs within the course and scope of employment. Because the wrongful conduct occurs in the course and scope of employment, we impute the discriminatory act to the agent's principal.

Id. at 351-52 (internal citations omitted).

Here, Waggeh points to no competent evidence in the record that

would establish who, specifically, the non-decision-makers motivated by alleged racial animus were, any evidence they actually held such racial animus, and whether the investigation conducted by the Department relied on facts provided by them. *See Boyd*, 187 Wn. App. at 17-19 (discussing evidence of causal connection under cat's paw liability under substantial factor). Importantly, Waggeh has not claimed that investigator Torstvet herself was biased in any way:

> "Q. And I just need to know whether you are claiming today, if you're claiming that Ms. Torstvet and all of her documents are somehow tainted or there's something wrong that happened at her end of the equation?
>
> A. *That's not what I'm claiming.*"

CP 579 (deposition testimony of Waggeh; emphasis added.)

As discussed above, Waggeh failed to submit evidence that any specific DOC supervisor acted with improper animus or that any person acting with animus influenced the decision-maker here. As such, Waggeh's eleventh hour resort to the new theory of cat's paw liability fails and does not support his Petition for Review.

Further, Waggeh's claim of possible "cat's paw" or subordinate bias liability was not raised or briefed below, nor was it raised or briefed before the Court of Appeals until his unsuccessful reconsideration motion. It comes too late now and should not be considered. *See* RAP 9.12.

C. To Demonstrate Pretext in His Claim of Retaliation, Waggeh Needed to Show More Than Mere Temporal Proximity to Survive Summary Judgment

Cornwell v. Microsoft Corp., 192 Wn.2d 403, 415–16, 430 P.3d 229

(2018), establishes that proximity in time can be used to create an issue of fact for the first prong of the burden-shifting framework under *Mikkelsen*. *Cornwell* itself states that "we are concerned with *only* the first step in this case." 192 Wn.2d at 411 (emphasis added). Waggeh incongruously argues that the Court of Appeals' opinion reads proximity of time "out of the law entirely." *See* Petition 18. That, however, is flatly wrong because the instant case does *not* address the first step of the analysis; it addresses only the third. *Cornwell* does not assist with the ultimate issue before this Court – whether Waggeh produced sufficient evidence that the Department's legitimate, non-retaliatory reason was pretextual.

Waggeh also attempts to sidestep *Mackey*, 12 Wn. App. 2d 557, in which Division II recognized that, in order to meet the pretext step of the *McDonnell Douglas* framework, a plaintiff must show more than mere temporal proximity between the protected activity and the termination. The factual and legal issues addressed in *Mackey* closely resemble this case.

Like here, the *Mackey* court was solely concerned with whether the employee presented evidence that the employer's nondiscriminatory reason for the adverse employment action was pretextual, or whether – even if the stated reason was legitimate – discrimination, retaliation, or violation of public policy also was a substantial motivating factor. 12 Wn. App. 2d at 581. The court explained that "*Cornwell* did not state that the proximity in time between a protected activity and termination created an inference *for purposes of showing that retaliation was a significant motivating factor* in the termination." *Id.* (emphasis in original).

The *Mackey* court thus recognized the difference in the burden in proving a prima facie case under the first step and proving pretext under the third step of the *McDonnell Douglas* burden-shifting framework:

> [L]imiting the rule that temporal proximity between protected activity and termination can create an inference of discrimination to the employee's burden to show a prima facie case makes sense. Showing a prima facie case is merely the first step in the *McDonnell Douglas* framework and often can be a fairly low bar. But in the pretext step, the employee has the burden of establishing a question of fact as to motivation regardless of the employer's evidence that there was a legitimate, nondiscriminatory reason for the termination. ***That burden necessarily must involve more than mere temporal proximity***. ***Otherwise, the legitimate, nondiscriminatory reason step and the pretext step would be meaningless any time there was temporal proximity between protected activity and termination.***

Id. at 584-85 (emphasis added).

Accepting Waggeh's argument would not result in merely a "harmless" redundancy, as he claims. *See* Petition 19 n.11. Rather, it would collapse the *McDonnell Douglas* framework into a single step whenever there is some evidence of proximity between protected activity and an adverse employment action. That is not supportable under Washington law.

In his initial briefing before the Court of Appeals, Waggeh pointed only to the proximity of time between his EEOC complaints and his termination to support of his claim of retaliation. *See* Appellant's Br. at 19-21 (arguing retaliation solely as to EEOC complaint); Appellant's Reply Br. at 14-17 (same). Under the totality of the record in this case, that evidence does not create a question of material fact as to the pretext prong. *See Mackey*, 12 Wn. App. 2d at 584-85. It also makes no sense. For

example, in *Cornwell*, the plaintiff employee had a long history of positive performance reviews and only received a negative evaluation shortly after her supervisor learned of her protected activity. 192 Wn.2d at 407-08, 416. Unlike that case, here, Waggeh was already under investigation for serious sexual misconduct, was interviewed, and had been notified of likely adverse employment consequences, including possible termination, *before* he filed his EEOC complaint. CP 318, 456-65, 726. Filing of an EEOC complaint in such circumstances does not immunize him from the consequences of his misconduct. Nor does it alone provide evidence that retaliation was a substantial factor in his termination.

Waggeh argues, as he did on reconsideration, that his complaints, objections, and grievances in 2008, 2010, and 2011 also support his claim of retaliation. *See* Petition 20. That argument comes too late and should not now be considered. But even if it were, the grievances filed several years before his termination in 2015 at most go only to establishing a temporal relationship between Waggeh's alleged protected activities and the adverse employment action. There was no evidence or argument offered indicating that the superintendent's decision to terminate Waggeh was in any way influenced by any grievances Waggeh made years earlier. Here too, a temporal relationship, without more, is insufficient to establish pretext in this case. *See Mackey*, 12 Wn. App. 2d at 584-85.

V. CONCLUSION

The Court of Appeals correctly affirmed the dismissal of Waggeh's claims under settled law. The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 23rd day of February, 2021.

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