

NO. 735462

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

JIMMIE R. GOODE

Appellants,

v.

TUKWILA SCHOOL DISTRICT 406,

Respondent.

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 OCT -2 PM 3:54

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II. INTRODUCTION

Plaintiff Jimmie Goode is a physical education teacher and coach employed with the Tukwila School District since 2007. Although he has received nothing but positive performance evaluations and regular step increases and promotion, Plaintiff urges that he has suffered an “ongoing pattern of harassment, discrimination, and disparate treatment” by Tukwila officials that has resulted in a negative impact on his work conditions. After completing extensive discovery that revealed a total absence of admissible evidence to establish that Plaintiff has been harmed or that any District conduct resulted in such harm, the Honorable Judge Andrea Darvas of the King County Superior Court dismissed his Complaint in its entirety. On review, the Tukwila School District asks this Court to affirm that dismissal.

III. RESPONSE TO ASSIGNMENTS OF ERROR

The Superior Court did not err because:

- A. Although on summary judgment the Court reviews the evidence in the light most favorable to the non-moving party, the Court may not abandon the requirement that a hostile work environment claim must include conduct subjectively **and** objectively offensive.
- B. Hostile work environment claims fail as a matter of law where the complained of conduct does not rise to the level of altering the terms and conditions of the plaintiff’s employment through its severity and pervasiveness.

- C. Plaintiff admitted he was not present for nor did he become aware at the time of allegedly racially hostile comments made by Superintendent Burke.
- D. Allegedly racially hostile comments made by Plaintiff's confidante whom Plaintiff continued to seek out for counsel and who was not in a managerial position may not be imputed to the District.
- E. The McDonnell Douglas burden-shifting test already contemplates a plaintiff submitting circumstantial evidence in support of their claim and no reason has been proffered to adjust the standard of proof required or to apply a "heightened scrutiny" to race discrimination cases.
- F. Adverse actions must involve more than an "inconvenience or alteration of job responsibilities" and must result in a negative impact on the employee's workload or pay.
- G. Plaintiff may not establish a negligent infliction of emotional distress claim on the same facts as his discrimination claims.
- H. Plaintiff's failure to submit medical evidence to sustain his negligent infliction of emotional distress claim required dismissal as a matter of law.

IV. COUNTERSTATEMENT OF THE CASE

Plaintiff began his employment with the Tukwila School District in March 2007; although he initially started just as a football coach, in August 2007 he was also offered a one-year provisional teaching contract to teach Health/PE at Foster High School. CP 79 at 49:4-13; CP 21. Mr. Goode was referred to the District by his friend, Daryl Wright, with whom he had worked in his prior position as a teacher at the Clover Park High School in the Clover Park School District (“Clover Park”). CP 80-82 at 51:23-53:11. Mr. Goode, who is African-American, left Clover Park in 2007 after having filed a lawsuit against that school district in which he alleged he had been subjected to racial discrimination. As a term of the settlement, he was required to resign and is precluded from any future employment with Clover Park. *See* CP 196. Mr. Wright was aware of Mr. Goode’s prior discrimination lawsuit at the time he referred Mr. Goode for the coaching position at Tukwila School District. *See* CP 83 at 68:8-25. Within a few months of being offered the one-year provisional contract, Ethelda Burke, also African-American, became Interim Superintendent of the District and eventually held the Superintendent position through her resignation in June 2012. Although the Plaintiff’s provisional contract was subject to non-renewal, at no time did Superintendent Burke seek to terminate his contract. Plaintiff admitted at deposition that Mr. Wright was his friend and confidante at Tukwila, and that they had a personal relationship that pre-

existed his employment with Tukwila and continues even after Mr. Wright recently left the District. *See* CP 1758, 1762-63¹, 1768, 1770, 1774; CP 1929.

Plaintiff, however, now alleges that he has been subjected to harassment, discrimination, and disparate treatment by and through the Superintendent Burke since 2008. CP 3 at ¶ 3.8. Allegations of racial harassment and disparate treatment were the subject of a separate lawsuit filed in 2013 by several African-American employees of the Tukwila School District. In that lawsuit, the employees alleged Superintendent Burke had made racially offensive comments to them that created a hostile work environment. Of note, Daryl Wright was a plaintiff in that lawsuit. The Plaintiffs in the case of *Wright v. Tukwila School District*, No. 13-2-05262-8 KNT, testified that, although the alleged racially offensive comments spanned over five years, each chose to file suit after they began in 2012 to learn of the alleged comments made to the others of which they were not previously aware. CP 929-1743; *see e.g.*, CP 1499 at 290:5-291:10 (Goins testified it wasn't until meeting with J.D. Hill within a month of a March 2012 meeting with their attorney that she began to learn of the other Plaintiffs' alleged experiences); Pie testified that she did not learn from JD Hill and Daryl Wright what they were allegedly experiencing until shortly before she filed her complaint. *See*

¹ Despite having testified that he has had recent personal email and Facebook communication with Wright, in response to Request for Production Goode failed to produce any such communication.

CP 1729-30 at 265:22-268:8 (“But then we found out the things that were happening with JD and Daryl, *I did not know of before*, then they found out what had happened with us.”). The District strenuously objected to the claims in that lawsuit and, following several dismissals of claims with prejudice, the parties settled that lawsuit in July 2014. *See* CP 189-90.

A. 2008 Coaching Suspension

In support of his claim of racial discrimination, Plaintiff alleges several allegedly discriminatory actions, but primarily relies on a suspension he received in October 2008 and his belief that the suspension reflected disproportionate treatment driven by Superintendent Burke. Br. P. 7-8. Plaintiff received the ejection as a result of conduct he engaged in at a football game while he was coaching, including using the word “fuck” in speaking with a referee and telling a referee to “take his flags home to his mother.” CP 91-92 at 123:24-124:6; CP 64-65. These comments resulted in the referee ejecting Mr. Goode from the game. The undisputed facts also established that Plaintiff’s ejection was a second penalty for “unsportsmanlike conduct” and that he had previously played an ineligible player, thereby resulting in the District being placed on probation. CP 2062-69. In response, Mr. Goode received a Letter of Reprimand from Vice Principal, Jim Boyce, which detailed the facts underlying the ejection and other areas of concern, including Plaintiff’s use of academically ineligible players and failing to respect the decisions of the Athletic Director, J.D. Hill (also African-American). *Id.* Given

this conduct and that he had been advised in his 2007 Fall Season Evaluation that he needed to “work on positive relationships with referees during games regardless of score,” Plaintiff was suspended from coaching duties for two games. *See* CP 22-24. This suspension extended to attending practice or games, but did not prevent his participation at the end of season team banquet or from collecting the team’s equipment. *Id.* Because these last two games were the last games of the season, it effectively suspended him from the remainder of the season. Although Plaintiff continues to insist that he was not allowed to attend the team banquet, he still fails to submit any evidence to support this assertion. In sum, Plaintiff failed to submit any evidence to support that the basis for his suspension was anything but the legitimate and nondiscriminatory reasons proffered by the District when it imposed the suspension seven years ago.

Despite the clear written dictates of the suspension, Mr. Goode disregarded the suspension and, not only attended the October 31st football game, but also suggested plays to one of the assistant coaches at the game, thus necessitating a follow-up disciplinary meeting. CP 62. Mr. Goode had also been asked to take the WIAA online rules clinic course, which he failed to do. *Id.*; CP 61. As a result of these actions, the District met with Mr. Goode and his union representative, Mr. Chuck Hurt, on November 7, 2008. CP 62. As a result of that meeting, the District issued a memorandum to Mr. Goode regarding his behavior. *Id.* In a letter received by the District on November 21, 2008,

acknowledging the results of the fact-finding meeting, Plaintiff resigned as football coach. CP 20. Although his resignation letter addresses his belief as to why he is being disciplined, specifically conflict with the Athletic Department (J.D. Hill), nowhere in the letter did Mr. Goode reference racism or discrimination. *Id.*; *see also* CP 55-57. (Plaintiff's 2008 Fall Season Coaching Evaluation in which the offending conduct is referenced and not disputed). Nor did Mr. Goode file a grievance or otherwise dispute the findings made by J.D. Hill and Jim Boyce. Shortly thereafter, on December 3, 2008, Plaintiff also resigned from his position as assistant track coach, despite that he had not been suspended from track coaching. CP 58.

Other than the football suspension in 2008, Plaintiff has not been suspended, demoted, or suffered other adverse action of or related to his employment. Plaintiff references the testimony of J.D. Hill in which Mr. Hill, in the course of his own lawsuit against the District, alleged that he believed that Ms. Burke "took over" the suspension. Br. P. 8. As he did in the trial court, however, Plaintiff ignored the rest of Mr. Hill's testimony in which Hill admitted that he had no personal knowledge of whether Superintendent Burke had any in the discipline and had no objective basis to think that she did have a hand in the discipline. CP 1924-25 and 1927-29.

B. Absences from Work Due to Medical Condition

In support of his claim of disparate treatment, Plaintiff asserts without evidentiary support that, during the 2012-2013 school year, he

was absent from work due to “stress-related medical conditions” and that Daryl Wright, who held the position of Assistant Principal at Foster High School, was told by someone at the District to check on the legitimacy of his medical condition. Br. P. 8-9. Plaintiff also alleges that a white counterpart was treated differently. Br. P. 42. Plaintiff has not, however, provided any evidence in support of this claim other than his own testimony. Further, even he admits that he does not know who allegedly directed Mr. Wright to “check on him” and that he was not asked to and did not submit any medical records or other information to purportedly legitimate his condition. CP 134-35 at 475:13-476:1. Indeed, Plaintiff’s vague testimony on this claim suggests more that someone at the District was concerned about him as opposed to that they disbelieved or were discriminating against him.

C. Principal’s “Rating” of Mr. Goode

Plaintiff alleges that Daryl Wright also told him that in a meeting then-Foster High School Principal Forrest Griek “gave Mr. Goode the lowest teacher rating.” CP 4 at ¶ 3.10. Plaintiff admits that he was not present during the meeting between Mr. Wright and Mr. Griek in which this low rating was allegedly expressed, and that Mr. Griek was not his evaluator. CP 101-102 at 187:3-188:8. Aside from the hearsay statements Mr. Wright made to Mr. Goode, there is no evidence of this alleged “low rating.” This alleged “low rating” is not memorialized and does not appear in any documentation. CP 129 at 442:14-19. Nor has the alleged “low rating” ever been incorporated into any of Plaintiff’s

evaluations. *Id.* at 442:20-22; CP 25-54. Indeed, Plaintiff admits that he has received consistently positive evaluations from his evaluator, who happens to be his friend, Daryl Wright. CP 100-102 at 186:2-188:18. Further, Plaintiff admits that he was not advised and/or did not ask what form the alleged “low rating” took, whether it was as to a specific category, or what the actual rating was. *Id.* at 442:23-443:2. By contrast, Principal Griek testified that he only had one conversation with Mr. Wright in which they discussed, not Plaintiff’s competency, but whether he, along with other teachers, could use some professional development support. CP 1875-77. Thus, to the extent there was even a “low rating,” it has not had any direct impact on Plaintiff’s employment or in any way resulted in any adverse action against Plaintiff.

D. Comments Attributed to Ethelda Burke

Plaintiff admits that he was never treated unfairly by Superintendent Burke, and that she never once said anything offensive to him. CP 95 at 145:19-22. To support his claim of being subjected to a hostile work environment, however, Plaintiff also alleges that Daryl Wright regularly told him that he was being treated more harshly or that actions were being taken against him because of Superintendent Burke. CP 4-6 at ¶ 3.11 and ¶ 3.20; *See, e.g.*, CP 85 at 96:2-12, CP 86-87 at 103:18-104:5, CP 88-89 at 113:25-114:19, CP 93 at 133:1-6. Indeed, Plaintiff alleges that Mr. Wright, who he acknowledges was and continues to be, his personal friend, said on more than one occasion that Superintendent Burke “does not like niggers.” CP 88-89 at 113:25-

114:19. Plaintiff admits that this was not a direct quote to be attributed to Superintendent Burke and that he found his friend's use of the "n-word" highly offensive, *but did not complain to Mr. Wright or anyone else*. See CP 90 at 115:10-13, CP 94-95 at 144:24-145:6.

Although he testified that he was never mistreated by Superintendent Burke and that she never said anything offensive to him or in front of him that he considered offensive, Plaintiff also testified that he once heard Superintendent Burke use the term "J. Dark" when referring to J.D. Hill. See CP 116-18 at 268:4-269:8. Plaintiff however admits that he did not understand the impact or meaning of the term, nor the context of the relationship between Ms. Burke and Mr. Hill, at the time that he heard it used. See *Id.* at 268:4-16. See also *id.* at 269:23-270:1. Moreover and importantly, Plaintiff testified that he was not upset by the use of the term when he heard it. See *id.*

While Plaintiff cites a laundry list of racially offensive comments Superintendent Burke is alleged to have made, importantly for this Court's review, he does not allege that he actually heard these comments or that he was made aware, at the time they were made, of the comments.² Br. P. 10-13; accord, Order of the Court Granting Summary

² For purposes of this appeal, the District does not challenge the credibility of the testimony concerning the alleged comments. However, review of the testimony from the other plaintiffs does indicate that their own testimony around what they believed was said comprised primarily hearsay and conclusory allegations. Even on summary judgment, the evidence must be admissible and not be comprised of conclusory allegations, speculative statements, personal beliefs, or argumentative, unsupported assertions. CR 56(e)(mere allegations or denials or conclusory statements of facts, unsupported by the evidence, do not sufficiently establish a genuine issue of fact).

Judgment (CP 2070-78). It is beyond disingenuous for Plaintiff to allege that “some of Burke’s comments were made in front of [him],” where there is no evidence in the record to support this assertion. Careful review of his self-serving declarations in support establish that he was not actually present or heard the alleged comments and that, other than “J. Dark” for which he has admitted not understanding the significance, he was only told by others what was allegedly said. CP 256-58. This lack of direct and personal knowledge and experience, coupled with the testimony from the other plaintiffs that they did not share their experiences with each other until immediately before filing their lawsuit, supports that Plaintiff’s attempt to support his hostile work environment claim with the actions directed at others fails as a matter of law.

E. Disparate Treatment from Shauna Briggs

Plaintiff also complains about alleged treatment that is disparate from that given to the other physical education teacher, Shauna Briggs, who is White, to include being removed and denied consideration as Department Head, being left out of decision-making, and being made to work in a dangerous environment. Br. P. 13-16. Plaintiff was head of the Physical Education (“P.E.”) Department from 2007 to 2008. CP 131 at 447:4-9. Thereafter, Shauna Briggs became department head after Plaintiff expressly and admittedly declined to take the position. CP 168-70 at 7:4-9:16. Although Plaintiff claims to have been denied consideration to act as P.E. Department Head again, he admits that he does not have any recollection of actually having applied to be the

Department Head and that he did not express his desire to be Department Head in writing to anyone, much less anyone with decision-making authority. CP 131-33 at 447:10-449:22. And the only person he ever allegedly verbally expressed any desire to be Department Head to was to Ms. Briggs herself. *Id.*, at 448:13-449:22. In addition, Plaintiff admitted that he had told both Ms. Briggs and another teacher in the P.E. Department that he was not interested in the Department Head position. *Id.*, at 448:21-24. Nor was he able to support his claim that he was left out of decision-making with citation to any specifics.

As far as his allegations that he was “required to work in a dangerous environment,” as even the trial court found despite its deference to Plaintiff’s factual assertions, Plaintiff wholly failed to submit direct or circumstantial evidence from which the Court can find that the condition of the weight room was as a result of Plaintiff’s race, and not lack of means, as asserted by the District. CP 1917-18, 1934-35, 1957-59, and 1961-62; *accord*, Order on Summary Judgment (CP 2070-78). Indeed, J.D. Hill and Ms. Briggs both testified that the condition of the weightroom had been a source of complaint for all staff.

F. Requests for Investigation into Shauna Briggs

Plaintiff alleges that Ms. Briggs made an allegation to a coworker that Plaintiff made sexually inappropriate comments to her; that he requested an investigation to “exonerate” him; and that no investigation was performed, thus resulting in harm to his reputation. CP 5 at ¶ 3.13. Mr. Goode admits that he heard of Ms. Briggs’ alleged comment from

Daryl Wright and that he has never discussed it with Ms. Briggs directly. CP 123-25 at 350:3-8, 352:6-12. Aside from his personal belief that Ms. Briggs was complaining about alleged sexually inappropriate comments, the only other knowledge Plaintiff has regarding the alleged sexual nature of the comment is from Mr. Wright. *Id.* In fact, Plaintiff has no specific knowledge as to the contents of the alleged comment by Ms. Briggs, and never asked Mr. Wright what Ms. Briggs is alleged to have actually said. *Id.* at 355:6-12. Plaintiff was not present to hear the alleged comment by Ms. Briggs and he has no documentation evidencing that Ms. Briggs ever made such a comment. Importantly, Plaintiff has not identified any person who was aware of this allegation such that his concern about his reputation is founded. Notably, Ms. Briggs has denied making an allegation against Plaintiff that he was sexually or otherwise inappropriate with her and has expressly denied ever filing a complaint of any kind against Mr. Goode. CP 171-81 at 15:2-23:10, 73:4-74:16. The concern she expressed to her mentor, Ms. Naganawa, was concerning Plaintiff “smothering her” and preventing her from figuring out “teaching on her own.” *Id.* Ms. Briggs was quite clear that the limits of Ms. Naganawa’s counsel was to advise her to “try to keep the relationship very professional and distance herself so she could establish her own classroom management.” *Id.* Furthermore, when Plaintiff insisted that an “allegation” had been made against him even though there was no complainant, the District actually offered to conduct an investigation, but Plaintiff declined. CP 59-60.

G. Receipt of Less Pay

Plaintiff alleges that he was “let go” from his position as track coach under the guise of failing to have his health card and that he was required to provide the documentation supporting his years of experience but that he was still denied a “few days” of the higher pay in “another example of being treated differently.” Br. P. 16-17 and CP 00265. The problem with this assertion, however, is that Plaintiff neither identified any other employee who was treated differently nor does he allege facts on which this Court could conclude that, what amounts to an administrative hiccup, is actually motivated by the Plaintiff’s race.

H. Use of District Facilities

Plaintiff alleges that the District discriminated against him in denying him the use of the District’s pole vaulting facilities so that he could train with his daughter, who was no longer a student at the time. Br. P. 17; *See also* CP 5 at ¶ 3.17. Although Plaintiff alleges that he “is aware that other alumni were allowed to use district facilities when they were home on breaks from college,” Plaintiff was unable to identify one single non-student who was allowed access to the unique pole-vaulting facilities. J.D. Hill testified that he made the decision to deny the use of the facility by a non-student given that his research showed that no other school district was allowing non-students access to such facilities. CP 143-46 at 39:21-42:6 (testifying that in collaboration with Daryl Wright, they concluded that use of the facilities by non-district students was a safety issue and would not be permitted). Linda Sebring also testified

that the policy of the District does not allow non-students access to District facilities due to the potential liability issues involved. 185-87 at 8:15-10:16. Indeed, Plaintiff admits that his daughter was previously injured on District property during use of the track facilities while under her father's supervision, causing her to miss a championship competition. CP 112-13 at 262:24-263:20; *see also*, CP 147-48 at 116:24-117:11. Plaintiff has never spoken with anyone directly nor has any knowledge of anyone who has used the pole vaulting facilities who was not a District-enrolled student. CP 114-15 at 266:22-267:5. Nor has he provided any documents or communications indicating that the District permitted any other individual who was not a District-enrolled student to use the pole-vaulting facilities.

I. Principal Search Team at Foster High School

In Spring 2013, Forrest Griek, then-Principal of Foster High School, resigned his position with the District. CP 152-153 at 4:23-25, 76:14-20. Thereafter, a Principal Search Committee was convened to find the next principal for Foster High School with the assistance of an outside consultant, former Superintendent of Issaquah School District, Dr. Janet Barry. CP 157 at 4:12-20. Daryl Wright applied for the position of Principal while he was still employed as the Vice Principal. *See* CP 161-64 at 16:1-4, 19:5-8. Following District-wide solicitation, Dr. Barry received applications from employees wishing to participate on the Committee, including from Mr. Goode. *Id.* at 18:19-19:4. *See also* CP 5-6 at ¶ 3.18. After consulting with District staff, however, Mr.

Goode was not selected to be a member of the Committee because of his known (and undisputed) association with Daryl Wright. CP 161-64 at 17:23-18:18. Dr. Barry did not select Mr. Goode for membership on the search committee specifically because of expressed concern that it would create a legitimate conflict of interest and appearance of bias. *Id.* at 19:5-8. Dr. Barry ultimately compiled a Principal Search Committee with several staff and students of color. *Id.* at 11:25-13:11. As the trial court found, Plaintiff presented no evidence that this explanation was a pretext for discrimination.

J. “Other Issues”

Plaintiff also alleges several more pages of “issues” that he alleges were ignored by the District and the Court in consideration of the motion for summary judgment. Br. P. 18-21. Many of the issues were addressed by the District in its briefing in the lower court and above, specifically: 1) the alleged condition of the weightroom; 2) alleged exclusion from decision-making and denial of a “name clearing” hearing; 3) the alleged direction to Ms. Briggs to stay away from Plaintiff; 4) the alleged racially offensive comments made by Superintendent Burke; the alleged “dumping” of students in Plaintiff’s classroom; 5) the leaving of urinary waste by a teacher who it is undisputed was concerned with water conservation; 6) the alleged defaced poster of the President of the United States; and 7) his alleged placement at a school prom. Not only did the District address these

issues, so did the Honorable Judge Darvas in her Order dismissing all his claims with prejudice. CP002070-78.

As far as his claim that the District moved Mr. Wright from Foster High School, “thereby removing the only African American at Foster High School with whom [Plaintiff] could confer.” Br. P. 18. This is in keeping with Plaintiff’s testimony wherein he admits that he and Mr. Wright remain close confidantes and that he frequently conferred with his friend on issues at Foster High School. However, in the course of briefing to the lower court and to this Court, Plaintiff also attempts to argue that his friend created a hostile work environment for him. As argued further below, a hostile work environment must be, above all else, *unwelcome*. *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). If Plaintiff, as he argues here, continues to seek Mr. Wright’s counsel, it cannot be said that Plaintiff’s interactions with him were unwelcome.

V. ARGUMENT

A. The Superior Court’s Dismissal on Summary Judgment of Plaintiff’s Claims As A Matter of Law Should Be Affirmed Because There Continues to Be A Lack of Admissible Evidence to Support the Required Elements of His Claims And There Are Otherwise No Genuine Issues of Material Fact.

i. STANDARDS OF LAW ON REVIEW

Summary Judgment. Civil Rule (“CR”) 56 provides that a motion for summary judgment “shall be rendered forthwith if [as in this case] the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). “The mere existence of some alleged dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material fact*.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986)(emphasis added). Further, although the facts are viewed in a light most favorable to the non-moving party, to survive summary judgment, the opposing party may not base its assertions on conclusory allegations, speculative statements, personal beliefs, or argumentative, unsupported assertions. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744, (1992); *see also*, CR 56(e) (mere allegations or denials or conclusory statements of facts, unsupported by the evidence, do not sufficiently establish a genuine issue of fact). Nor can a plaintiff support their opposition with inadmissible hearsay or an affidavit contradicting prior deposition testimony. *Davis v. Fred’s Appliance, Inc.*, 171 Wn. App. 348, 357, 287 P.3d 51 (2012); *see also*, *Payne v. Children’s Home Soc’y of Washington, Inc.*, 77 Wn. App. 507, 515, 892 P.2d 1102 (1995) (affirming summary judgment dismissal of discrimination claim because plaintiff’s own statements regarding the treatment of other employees were conclusory and constituted inadmissible hearsay).

Instead, to defeat summary judgment, the non-moving party “must **establish specific and material facts** to support each element of

his or her prima facie case.” *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000) (emphasis added). If a plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial, summary judgment is proper.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Lay witnesses may present facts and **reasonable** inferences therefrom, based upon **personal observations** and **rational perceptions**. ER 701; *State v. Lass*, 55 Wn. App. 300, 777 P.2d 539 (1989). However, opinion on a question of law is generally inadmissible. *Everett v. Diamond*, 30 Wn. App. 787, 791-92, 638 P.2d (1981).

Plaintiff has submitted nothing but his own self-serving, yet unspecific and incredible, declarations in efforts to defeat summary judgment. The Superior Court understood that this “evidence” was insufficient under the standards espoused under CR 56 and the case law concerning the claims he alleges. Plaintiff apparently does not, and persists in urging that the Court accept *pro forma* his subjective characterization of objectively non-racial and non-offensive comments and conduct as evidence of racial animus. This Court must reject those efforts.

Contrary to Plaintiff’s assertions, the District did not “argue its interpretation of hotly disputed facts.” Br. P. 22. Indeed, the District at trial would take great exception to Plaintiff’s factual assertions, however,

in the context of the briefing on the motion for summary judgment, the majority of the facts submitted to the trial court for consideration came from Plaintiff's own testimony and/or documentary evidence and were assumed for purposes of the motion only. See CP 198-220. And where evidence was submitted from other sources, it was the only evidence on that point, so no dispute arose. Thus, there were no issues of fact that the Superior Court failed to appreciate.

Further, the critical point the Plaintiff himself fails to appreciate is that any issue of fact sufficient to defeat summary judgment, must be genuine and *material*. CR 56(c) and (e). Thus, disputes as to minor inconsequential factual assertions do not defeat summary judgment if the claim does not depend on those assertions.

II. PLAINTIFF'S CLAIM OF A HOSTILE WORK ENVIRONMENT FAILS BECAUSE HE WAS NOT THE SUBJECT OF, AT THE TIME AWARE OF, OR WITNESS TO, RACIALLY OFFENSIVE CONDUCT IMPUTABLE TO THE DISTRICT THAT WAS SEVERE AND PERVASIVE TO THE DEGREE IT ALTERED THE TERMS AND CONDITIONS OF HIS EMPLOYMENT.

To support a claim of a hostile work environment, Plaintiff is required to make a prima facie case that the actions (1) were unwelcome; (2) were because of the plaintiff's status as a member of a protected class; (3) affected the terms or conditions of employment; and (4) could be imputed to the employer. *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 406-07, 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.” *Id.* Indeed, the courts have dismissed alleged harassment that is not sufficiently pervasive so as to create an “abusive” environment. Whether harassment is sufficiently severe or pervasive so as to alter the terms and conditions and create an abusive environment is determined by looking at the “totality of the circumstances.” *Id.* This involves consideration of “the frequency and severity of harassing conduct, whether it was physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably interfered with the employee’s work performance.” *Davis*, 171 Wn. App. 348, 362-63, 287 P.3d 51 (2012). The conduct must be objectively and subjectively abusive. *Id.* It is “insufficient that the employer’s conduct is merely offensive or vulgar,” and isolated indiscretions, although “offensive and inappropriate,” cannot support a hostile environment claim. *Crownover v. Dep’t of Transp.*, 165 Wn. App. 131, 146, 265 P.3d 971 (2011).

1. Plaintiff failed to present sufficient admissible evidence of a severe and pervasively hostile work environment through objectively and subjectively hostile conduct.

Plaintiff insists that this Court should give his self-serving testimony even greater weight because he is a victim of discrimination and/or a member of his ethnic background, which, therefore, entitles him to speak exclusively as to his experience. Br. P. 2-3, 22. Plaintiff is essentially urging this Court to abandon the requirement that a hostile work environment claim must be founded on subjectively **and** objectively hostile conduct and instead adopt an exclusively subjective

standard. Respectfully, this Court should reject this invitation and apply the law as has been expressed in its jurisprudence for years and most recently affirmed in *Crownover*, 165 Wn. App. at 144-45 (“Asserting subjective offense to [statement] cannot prevent summary judgment dismissal.”). And under that law, Plaintiff’s claim of a hostile work environment fails.

2. Plaintiff adduced insufficient evidence to establish that any conduct was directed at him because of his race.

The conduct directed at Plaintiff that he alleges resulted in a racially hostile work environment includes: the alleged discovery of a defaced poster of President Barack Obama (Br. P. 29); his injury in the all staff and student-accessible weight room (Br. P. 29); his alleged “firing” for a few days due to not having his health card (Br. P. 29); being brought unidentified “problem” students despite his testimony that he enjoyed working with those students (Br. P. 30); Plaintiff’s opinion that the discipline imposed on a colleague for an off-color remark was inadequate (Br. P. 30); Ms. Briggs being advised to keep her distance when she expressed concern about his smothering (Br. P. 32); the denial of an investigation and “name clearing” hearing to respond to a phantom claim of sexual harassment (Br. P. 33); being “removed” from the position of Department Head (after he resigned and then declined to take the position) and being denied “input” on unidentified issues or those within the authority of the Department Head (Br. P. 33); a teacher, who it is undisputed was solely concerned with water conservation, leaving urine unflushed in the publically accessible only private bathroom in the

locker room area (Br. P. 34); and being assigned to guard the back door of a student prom during a volunteer chaperone assignment (Br. P. 34). Plaintiff fails to appreciate, as Judge Darvas did, that there is an absolute and total absence of evidence on which a court could conclude that any of the above conduct was motivated by Plaintiff's race, let alone that they represent hostile acts that gave rise to a severe and pervasively hostile work environment.

For example, while the District disagrees with the repeated assertions that the weightlifting room was "nightmarish," it was so described by several employees who used the gym in the course of their work, including those who do not identify as African-American or in a protected class. Thus defeating any inference that the weightlifting room was made "nightmarish" as a result of Plaintiff's race. *Crownover v. Dep't of Transp.*, 165 Wn. App. 131, 144-46, 265 P.3d 971 (2011) (rejecting that an assertion of subjective offense or conclusory allegation that conduct was racially motivated and interfered with work is sufficient to prevent summary judgment dismissal).

The allegation that he was "removed" from the position of department head is incredulous given his own testimony that he initially advised his colleagues that he did not want the position and then advised only the person who held the position of his desire to have it. It is not hostile conduct imputable to the District to fail to be considered for a position the plaintiff never applies for.

Plaintiff relies on *Antonius* and *McGinest* to support his argument that the facts alleged herein give rise to a hostile work environment claim and survive summary judgment. Br. P. 29. As Plaintiff himself notes, in *Antonius*, the female employee was subjected to a pattern and practice, indeed a policy, of sexually offensive pornographic material being present in her workplace. *Antonius*, 153 Wn. 2d at 259-260 (noting that employer provided pornographic materials to the inmates Antonius was assigned to supervise).

By contrast, here, Plaintiff alleges that on one occasion he entered a classroom in which he was assigned to emergency substitute for sixth period (so not his regular classroom and one in which other substitutes had been assigned during the day) and he allegedly saw a poster of President Obama in blackface. Br. P. 29, CP 267 and 415; see also CP 1871. This experience did not upset him enough to retain the poster and submit it to the District, however, thereby eliminating any possibility for the District to examine the poster to confirm that it was what Plaintiff says it was, or to investigate who placed it in the classroom and how it came to be in the classroom. Indeed, Plaintiff readily admits that after this incident the totality of his concern was expressed in a single email to the Assistant Principals, including his confidante, Daryl Wright, in which Plaintiff does not request an investigation but instead asks the rhetorical question, “Please tell me that no other adult had seen this and had not spoken to you about this [sic],” and in a brief conversation with the regular teacher, who he cannot recall

acknowledging having seen the poster or knowing it was there. This is not equivalent to or even on par with the hostility directed at the Plaintiff in *Antonius*.

Similarly, in *McGinest*, the Plaintiff was the target of a campaign of racially hostile conduct that was objectively and subjectively hostile and directed at him. Indeed, the plaintiff in *McGinest* was able to survive summary judgment because he submitted ample evidence, including from a third-party witness, establishing that **he complained over a two-year period** about harassment that included regularly being subjected to objectively offensive and abusive language, such as “stupid nigger,” “dumb son of a bitch,” “I will never work for a Black Man,” “colored guy,” “Aunt Jemima,” and where bathroom graffiti included the words “nigger,” “white is right,” and “nigger go home.” Plaintiff at bar has been subjected to no such hostility or commentary.

Further, unlike the vehicle that was poorly maintained in *McGinest* that directly caused that plaintiff injury, here Plaintiff’s injury is not disputed to be the result of a weight plate falling off a weight bar, thus unrelated to the condition of the room itself, and, in any event, a weight bar that was accessible to and expected to be used by all staff and students with access at the District. Therefore, there is no demonstrable targeted animus and the claim fails.

3. Even considering the testimony of plaintiffs in other litigation, no hostile work environment for this Plaintiff was established.

Given the paucity of evidence to establish that he suffered a hostile work environment claim as a result of conduct directed at him, Plaintiff attempts to buttress his claim by devoting significant space in his briefing to what was alleged to have been said by Superintendent Burke to other African-American staff at the District and relying on *La Dolce v. Bank Admin. Inst.*, 585 F. Supp. 975 (1984); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130 (1988), and *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). However, these cases only hold that evidence of conduct directed at or suffered by others is admissible; they do **not** hold that a plaintiff may base the totality of their claim of hostile environment on conduct alleged directed to and suffered by others. *LaDolce*, 585 F. Supp. at 977 (admitting evidence or testimony regarding alleged discriminatory conduct with respect to others because it might support an inference of discrimination); *Mullen*, 853 F.2d at 1133-35 (admitting evidence of use of racially offensive language by the **decisionmaker** because it is relevant to whether racial animus was behind membership decision made by that **decisionmaker**). In fact, it is baffling that Plaintiff would cite to *Clark County* for the proposition that “workplace conduct is not measured in isolation,” when the U.S. Supreme Court goes on to reiterate the law that also applies in Washington state:

Instead, whether an environment is sufficiently hostile or abusive must be judged by ‘looking at all the circumstances, including the ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’ Hence, “[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’

Clark County, 532 U.S. at 270-71 (internal citations and quotations omitted). The Supreme Court goes on to reinstate the summary judgment dismissal of the claim because the isolated event at issue as a matter of law did not change the “terms and conditions” of the plaintiff’s employment.

In any event, in this case, Judge Darvas, over the District’s objections, did admit the hearsay conclusory testimony of other plaintiffs by and through the transcripts obtained in the *Wright v. Tukwila* litigation. The District, however, also asked that, to the extent isolated allegations from those transcripts be admitted, so should the entire transcript wherein the plaintiffs admitted they were making subjective, conclusory allegations and often without personal knowledge. See, e.g. CP000585, 814-16 (in which it is evident the plaintiffs were relying on hearsay for their testimony), More importantly, as they relate to this Plaintiff’s allegations, those plaintiffs testified that *they did not discuss or reveal the alleged comments made by Superintendent Burke until immediately before they determined to file the EEOC Charges of*

Discrimination and the lawsuit. Thus, Plaintiff was not made aware of the allegations of racially offensive comments until those plaintiffs immediately before the filed their Complaint in Superior Court. Accordingly, while the District disputes that a hostile work environment claim may be founded on conduct directed exclusively at others given this Court's holding and analysis in *Crownover*, in this case the claim fails regardless. *Crownover v. Dep't of Transp.*, 165 Wn. App. 131, 143, 265 P.3d 971 (2011) (to sustain a hostile work environment claim and defeat summary judgment, a plaintiff must allege abusive comments directed at him or her).

4. Plaintiff's attempt to allege hostile work environment through stringing together random, isolated objectively non-racial actions must be rejected.

In further efforts to strengthen his hostile work environment claim, Plaintiff attempts to string together a variety of unrelated actions and protagonists to allege a single hostile work environment. Plaintiff at once argues Superintendent Burke was the source of the racial hostility, yet at others argues that it was Principal Griek, or Assistant Principal Morgan, or his friend, Assistant Principal Wright, or Ms. Briggs, or Mr. Reed. As the Court made clear in *Crownover*, to the extent a continuing hostile environment is alleged, the plaintiff must establish that the acts involved the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers. *Crownover*, 165 Wn. App. at 142. Acts that are so discrete in time or circumstances that they do not reinforce each other do not constitute a single hostile work

environment. *Id.* at 144. In this case, however, Plaintiff only identifies isolated interactions imposed by differing actors with no common agenda and spanning several years. This is insufficient for this Court to conclude they were part of the same actionable hostile work environment practice.

5. Any alleged hostile comments directed at Plaintiff by his confidante, Daryl Wright, are not imputable to the District.

Finally, Plaintiff attempts to ground his hostile work environment claim on the alleged racially offensive language of his confidante and admitted friend, Mr. Daryl Wright. Plaintiff admitted that he never complained to anyone about Mr. Wright using the “n-word” in conversation with him and yet, he returned to engage with Mr. Wright. The law requires at its core that to establish a hostile work environment claim, the conduct must be unwelcome. Further, Mr. Wright was not a manager to whom liability could be imputed; this is especially true given that the terms of Plaintiff’s employment is governed by contract and collective bargaining agreement. *Davis v. Fred’s Appliance*, 171 Wn. App. 348, 362-63, 287 P. 3d 51 (2012)(affirming summary judgment and distinguishing supervisor as someone who creates company policies and has authority to execute contracts on behalf of business, or was otherwise the “alter ego” of the company); *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 856, 991 P.2d 1182 (2000)(holding mid-level manager

who supervised and even hired other employees not a “manager” for purposes of imputing liability to employer).

III. IN THE ABSENCE OF EVIDENCE TO SUPPORT THAT HE SUFFERED AN ADVERSE ACTION IN THE STATUTORY PERIOD THAT WAS MOTIVATED BY RACE, PLAINTIFF’S CLAIM FOR DISPARATE IMPACT WAS PROPERLY DISMISSED.

Disparate treatment occurs when an employer treats some people less favorably than others because of race, color, religion, sex, or other protected status. To establish a prima facie disparate treatment discrimination case, a plaintiff must show that his employer simply treats some people less favorably than others because of their protected status. A plaintiff may establish a prima facie case by either offering direct evidence of an employer’s discriminatory intent, or by satisfying the McDonnell Douglas burden shifting test that gives rise to an inference of discrimination. *Alonso v. Qwest Commc'ns Co.*, 178 Wn. App. 734, 743-744, 315 P.3d 610 (2013). When evaluating summary judgment motions in employment discrimination cases under the Washington Law Against Discrimination (“WLAD”), Washington courts have largely adopted the federal burden-shifting scheme announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Kirby v. City of Tacoma*, 124 Wn. App. 454, 468, 98 P.3d 827 (2004); *Fulton v. Dep’t of Soc. & Health Servs.*, 169 Wn. App. 137, 148-50, 279 P.3d 500 (2012). This burden-shifting scheme is commonly used where, as here, a plaintiff has brought an individual, disparate treatment lawsuit, and they lack direct evidence

of discriminatory motive. *Id.* Under this burden-shifting scheme, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. If the plaintiff fails to establish a prima facie case, the defendant is entitled to judgment as a matter of law. *Id.*

To allege a prima facie claim of disparate treatment due to racial discrimination, Plaintiff will be required to prove that he (1) is in a protected class; (2) suffered an adverse employment action; (3) was doing satisfactory work; and (4) was treated differently than others not in the protected class. *Kirby*, 124 Wn. App. at 465; *see also Washington v. Boeing*, 105 Wn. App. 1, 15-16, 19 P.3d 1041 (2000) (Plaintiff must show that they were treated less favorably in the terms and conditions of employment than a similarly situated non-protected employee who was doing substantially the same work). And, to be actionable, an adverse employment action must involve a change in employment conditions that is more than an “inconvenience or alteration of job responsibilities.” *Kirby*, 124 Wn. App. at 465 (disciplinary or investigatory job actions do not constitute adverse employment actions as they are inconveniences that do not have a tangible impact on the employee’s workload or pay); *see also, Alonso*, 178 Wn. App. at 746 (“An adverse employment action involves a change in employment conditions that is more than an inconvenience or alteration of one’s job responsibilities, such as reducing an employee’s workload and pay.”).

If and when, the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to articulate a legitimate,

nondiscriminatory explanation for the adverse employment action. *Id.* If, however, the defendant provides a nondiscriminatory reason for its employment action, the presumption established by the plaintiff's prima facie case is rebutted and it "simply drops out of the picture." *Id.*; see also *Fulton*, 169 Wn. App. at 148-50. The burden then shifts back to the plaintiff to show that the defendant's reason is actually pretext for what, in fact, is a discriminatory motive. *Id.* To show pretext, a plaintiff must show that the defendant's articulated reasons: (1) had no basis in fact; (2) were not really motivating factors for its decision; (3) were not temporally connected to the adverse employment action; or (4) were not motivating factors in employment decisions for other employees in the same circumstances. If the plaintiff fails to make this showing of pretext, the defendant is again entitled to judgment as a matter of law. *Kirby*, 124 Wn. App. at 468.

Thus, the trial court should submit the case to a jury "**only** when it determines that all three facets of this burden-shifting scheme are met and that the parties have produced sufficient evidence supporting **reasonable** but competing inferences of both discrimination and nondiscrimination." See *Fulton*, 169 Wn. App. 137. Otherwise, summary judgment is appropriate and warranted. *Id.* (affirming summary judgment in absence of sufficient demonstration that defendant's reasons for failing to promote plaintiff was pretext for gender discrimination) (emphasis added).

As noted, the standards applicable to claims of racial discrimination already contemplate that “direct or smoking gun” evidence is rarely available to a plaintiff to sustain their claims and, therefore, permit consideration of circumstantial evidence of racially discriminatory motives. However, that circumstantial evidence must still be admissible and actually support this plaintiff’s claims of racial discrimination. While the law allows a plaintiff to survive summary judgment by establishing “reasonable but competing inferences of both discrimination and nondiscrimination,” the District directs the Court to the emphasis on *reasonable*. In this case, Plaintiff urges inferences that can not reasonably be drawn from the evidence and that are patently unreasonable.

Plaintiff cites to *Fonseca v. Sysco Food Serv. of Ariz.*, 374 F.3d 840, 847 (2004), for the proposition that “adverse employment action” is interpreted broadly and may include reductions in compensation, a warning letter or negative review, undeserved performance evaluations, and transfers of job duties. P. 40. Plaintiff, however, does not allege any of those referenced actions, thus, *Fonseca* is inapposite (in addition to that it interprets adverse action under federal law and not Washington law). With respect to his reference and reliance on *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987), Plaintiff ignores that the court, while holding that “transfer of job duties and undeserved performance ratings” could constitute adverse employment actions, also required that they be *proven*. *Id.* Here, Plaintiff was not able to identify any job

duties that were transferred or any performance ratings that were undeserved or even negative and, thus, was not able to sustain his minimal burden on summary judgment.

With the exception of the suspension in 2008, which is outside the statute of limitations and therefore not recoverable, all of the actions Plaintiff identifies as “adverse” are not adverse under Washington law and do not support disparate treatment to Plaintiff:

Game suspension in 2008. Not only is this action outside the statute of limitations and, therefore, not recoverable, the District had unrefuted legitimate, nondiscriminatory reasons for imposing a two game suspension. *Crownover*, 165 Wn. App. at 141-43 (discrete discriminatory actions are not subject to continuing violation theory and must occur within statute of limitations). Plaintiff had already exposed the District to being placed on probation for failing to take the rules clinic, and knowingly playing an ineligible player.

Being moved out of the Department Head position. Br. P. 41. As noted previously, he admits he was not moved out but that he expressly declined to take the position and, thereafter, only expressed interest once and to the person who held the position. To expect the person who held the position to simply abdicate it on his vague expression of interest is not only unreasonable, it does not represent an adverse action motivated by race and imputable to the District.

White Department Head being permitted to make decisions. Br. P. 41. Plaintiff does not allege that he was not permitted to provide

input, but that the Department Head was permitted to make decisions without his input. However, Plaintiff has not identified any obligation or District requirement that he be consulted for input, and, indeed, the very nature of a “Department Head” position is that they have authority to make decisions on behalf of the Department.

Denial of “Name Clearing Hearing”. Br. P. 41. As Ms. Briggs herself testified, she did not make an allegation that Plaintiff sexually harassed her. The evidence of this alleged sexual harassment “allegation” was comprised of exclusively hearsay offered by Plaintiff concerning what his friend Mr. Wright, in the course of his own lawsuit against the District and for reasons one can only imagine, told him. Further, on Plaintiff’s insistence that the “allegation” be investigated, the District offered to do so but Plaintiff, through his legal representative, declined. CP002006-18. His insistence on having an investigation on a mythical sexual harassment complaint was eventually taken up, but his own attorney declined to have him participate following her conclusion that it was more advantageous to pursue a civil suit. *Id.*

Plaintiff did not offer any evidence to refute or create an issue as to these facts.

Mentor’s alleged failure to have a “discussion with Mr. Goode to enhance his abilities.” Br. P. 42. This allegation is insufficient as a matter of law to support an “adverse employment action,” when Plaintiff has not established, for example, that he was rated poorly in mentorship

performance or that the failure to have a discussion with him produced a tangible negative impact on his employment.

Alleged Evaluation as a “low performing teacher.” Br. P. 42. Plaintiff persists in urging that he was rated “poorly” despite a total lack of admissible evidence to establish that there was a negative evaluation or that it had any impact on his employment. This allegation was yet another hearsay specter offered into evidence as a result of Daryl Wright’s representations to Plaintiff during the pendency of his own lawsuit. By contrast, the admissible undisputed evidence established that all of Plaintiff’s performance evaluations have been superlative, Mr. Griek was never his evaluator, and Plaintiff was unable to identify what the negative evaluation concerned.

District ignoring Plaintiff’s reports of safety issues. Br. P. 42. Plaintiff argues that his reports of safety issues were ignored and he was required to work in an unsafe weight room. As an initial matter, the District notes that the opinion the weight room was unsafe was shared by many staff members, not just Plaintiff, and that many complained and did not have their demand for new equipment met. Further, as to his claim that he was “required” to work in an “unsafe” weight room, even the evidence cited to by the Plaintiff establishes that, at most, the District was subjecting all staff and its students to the risk of injury in the weight room. CP 425-34. While the District certainly disagrees with the characterization of its weight room as “unsafe,” to the extent the evidence supports it, it does highlight the absence of any evidence on

which any fact-finder could find that the weight room was maintained in that condition *because of Plaintiff and his race*. Finally, the mere fact that Ms. Briggs did not have a formal weightlifting class until after the new equipment does not mean she never used the weight room. Indeed, she even testified that she had taken groups of classes to work in the weight room. CP 00801.

Absences closely scrutinized and being treated differently from his White counterpart. Br. P. 42. This is yet another allegation supported only by hearsay as to what Daryl Wright allegedly told Plaintiff. As with the other inadmissible hearsay evidence, the belief that his absence was “closely scrutinized” comes from a single, vague statement from Daryl Wright that he was “sent to check on [Plaintiff].” Plaintiff admitted that he was never asked to submit any medical documentation or that the issue arose in an official capacity. Nor was he able to identify the “white counterpart” from whom he alleges he was treated differently. Absent an adverse impact or a comparator, Plaintiff’s claim was properly dismissed.

Discharge from and denial of proper pay for Assistant Track Coach position. Br. P. 42. The evidence Plaintiff himself submits establishes that he was not given the position because he did not have his health card. While he has asserted in this litigation that he was “fired after he questioned his pay,” the admissible evidence does not support any inference that the discharge was related or connected to any “questioning” of his pay. Characterizing a short period of days where he

did not hold the position due to a communication gaffe as “firing” is subjective and insufficient to sustain his obligation to show he was subjected to adverse actions because of his race. Further, conclusory allegations beyond the scope of a person’s knowledge are not admissible to defeat summary judgment. Aside from Plaintiff’s own allegations that he “questioned” his pay, there is no evidence to sustain this claim. As far as his claims that the reinstatement did not address the prior days he was underpaid, Plaintiff has not submitted any evidence of what pay was underpaid.

Rejection from Principal Selection Committee. Br. P. 42.

Plaintiff was not selected to participate in the principal selection committee. The fact that other non-protected employees were also not selected, itself supports dismissal as a matter of law since there was no showing of disparate treatment. In addition to that, however, that Plaintiff is admittedly a close friend of then-candidate Daryl Wright, with whom he previously worked and who recommended him for the position at Tukwila. The District’s stated objective in finding an unbiased committee is undisputed and represents a legitimate non-discriminatory reason for not choosing him for the committee. Finally, failure to be selected for an elective committee is not sufficient to establish an impact such that Plaintiff’s right to be free from discrimination in employment has been affected.

Denial of access to students and staff at prom. Br. P. 43. Plaintiff complains that he was “assigned to stand outside the back door for the

evening.” The District disputes that an adverse action can even arise under RCW 49.60 from a volunteer chaperoning assignment at a student prom, which has no impact on Plaintiff’s right to hold and obtain employment. Even assuming, however, that it does Plaintiff does not submit any evidence to support that he was not, as alleged, “allowed to interact with the students and other staff.” And, in fact, his own evidence and the testimony of witnesses establish that he did have contact with other staff at the prom, thus defeating even the specious basis for this claim. The Court’s dismissal of this claim should be affirmed. CP207 (dismissing because Plaintiff failed to establish being asked to monitor the back door was motivated by racial discrimination).

All of Plaintiff’s assertions of disparate treatment or impact, whether considered individually or collectively, fail to establish either adverse impact on his employment, as required under RCW 49.60, or give rise to an inference that the conduct was motivated by race and not by the District’s stated legitimate, nondiscriminatory reasons. Accordingly, Plaintiff’s claims were properly dismissed.

IV. THE TRIAL COURT PROPERLY DISMISSED GOODE’S CLAIM OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS BOTH BECAUSE HIS CLAIM DID NOT ASSERT FACTS DISTINGUISHED FROM THE EMPLOYMENT ACTIONS GENERALLY AND BECAUSE HE FAILED TO SUPPORT IT WITH REQUIRED MEDICAL EVIDENCE.

Negligent infliction of emotional distress may be a cognizable claim in the workplace when it does *not* result from an employer's disciplinary acts or its response to a workplace personality dispute. *Strong v. Terrell*, 147 Wn. App. 376, 387, 195 P.3d 977 (2008) (internal citations omitted) (emphasis added). And while an employee may recover damages for emotional distress in an employment context, he may do so *only* if the factual basis for the claim is distinct from the factual basis for the discrimination claim. *Haubry v. Snow*, 106 Wn. App. 666, 678 (2001) (emphasis added). Nonetheless, even assuming his emotional response to the workplace could be characterized as emotional distress arising from a separate factual basis, the absence of any medical evidence warrants dismissal. To establish a claim of negligent infliction of emotional distress, “a plaintiff must prove he has suffered emotional distress by ‘objective symptomatology,’ and the ‘emotional distress must be susceptible to medical diagnosis and *proved* through medical evidence.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 196-97, 66 P.3d 630 (2003) 40-42 (emphasis added). The symptoms of emotional distress must also “constitute a diagnosable *emotional* disorder.” *Id.* (emphasis added).

The District moved for summary judgment on the negligent infliction of emotional distress both because there were no facts alleged distinguishing that claim from Plaintiff's other claims, and also

because the absence of any medical evidence warranted dismissal. CP000217. The trial court dismissed Plaintiff's claim of negligent infliction of emotional distress because it found Goode had "made no showing that the factual basis for such a claim is distinct from the factual basis for his discriminations claim," as required under *Haubry v. Snow*, 106 Wn. App. 666, 678 (2001)(an employee may recover damages for emotional distress in an employment context, but *only* if the factual basis for the claim is distinct from the factual basis for the discrimination claim). Indeed, Goode does not dispute this conclusion and admits as much when he alleges "as a result of [his] working conditions and the discriminatory environment in the Tukwila School District," he suffered emotional distress. App. Br. 44-45. The entirety of his claim for negligent infliction of emotional distress is founded on the alleged disparate treatment he received in being suspended and other acts he also alleges subjected him to racial discrimination. This is insufficient to sustain a claim of negligent infliction of emotional distress arising out of an employment context. *Haubry*, 106 Wn. App. at 678. Accordingly, the trial court's dismissal of the negligent infliction of emotional distress should be affirmed. *Id.* at 678 (affirming dismissal of claim where there was no separate compensable claim because the factual basis was the same as the underlying harassment and discrimination claims).

Further, the trial court could have dismissed based on Goode's failure to submit sufficient objective and medical evidence in support. An element of the claim of negligent infliction of emotional distress is

that the distress must be susceptible to medical diagnosis and “proved through medical evidence.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 196-97 (2003); *see also, Haubry*, 106 Wn. App. at 678-79 (affirming that a plaintiff’s claims of objective symptomatology is insufficient, “there must be objective evidence regarding the severity of the distress and the causal link between the actions of the employer and the subsequent emotional reaction of the employee.”). Despite Goode’s protestations to the contrary, that a plaintiff submit medical evidence to support a claim of negligent infliction of emotional distress is an established element of the claim and no basis has been asserted for this Court to modify existing law. In this case, Goode failed to submit sufficient evidence of a “causal link” between the alleged conduct and the alleged distress. Doctor Schmitt’s declaration did not even allege proximate cause, and, instead, indicated that Goode’s medical conditions are “more probably than not *related, in part*, to his work environment” and also to “pain from a musculature skeletal injury.” CP 845-46. Saying Goode’s work environment is “related,” and further qualifying it by saying “in part,” to his conditions does not establish that the environment is the proximate *cause* of the conditions, as required to defeat summary judgment. As such, the trial court’s dismissal may also be affirmed on this basis.

V. THE TUKWILA SCHOOL DISTRICT SHOULD BE AWARDED FEES AND COSTS ON APPEAL PURSUANT TO RAP 18.9 GIVEN THAT THE APPEAL IS FRIVOLOUS AND MAKES THE SAME SPECIOUS ARGUMENTS SUBMITTED TO AND REJECTED BY THE SUPERIOR COURT.

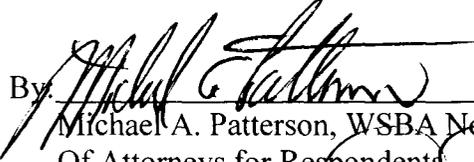
Plaintiff asserts many of the same frivolous and nonsensical arguments he made at the trial court level; in addition to making many of the same factual assertions that are directly disputed by his own testimony and evidence. This has undoubtedly resulted in harm to the District as it not only required the expenditure of resources to respond to this frivolous appeal, but also required significant time to respond to every specious and inadmissible assertion. Accordingly, the District asks this Court to enter sanctions pursuant to RAP 18.9 in the amount of reasonable attorneys' fees and costs associated with the filing of the instant response brief.

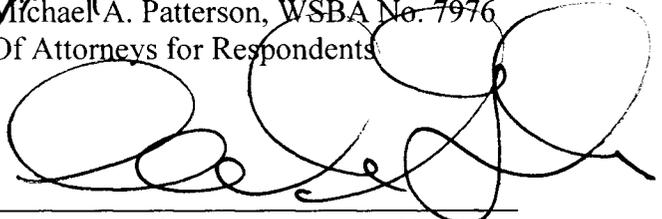
V. CONCLUSION

For all the foregoing reasons, the District respectfully requests this Court affirm the Superior Court's dismissal of Plaintiff's claims as a matter of law. The absence of any genuine dispute of fact, in addition to the failure to submit sufficient admissible evidence in support of his claims, warrants dismissal. Further, because Plaintiff's claims rely on much the same frivolous arguments and inadmissible facts as proffered in the Superior Court, this Court should grant sanctions pursuant to RAP 18.9.

RESPECTFULLY SUBMITTED this 1st day of October, 2015

PATTERSON BUCHANAN
FOBES & LEITCH, INC., PS

By: 
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Of Attorneys for Respondents

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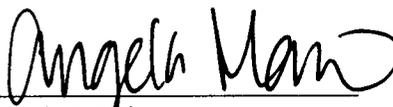
CERTIFICATE OF SERVICE

I, Angela Marino, hereby declare that on this 1st day of October, 2015, I caused a true and correct copy of this Response in Opposition to Appeal as of Right to be served on the following in the manner indicated below:

ATTORNEY NAME & ADDRESS	METHOD OF DELIVERY
Mr. Richard H. Wooster, WSBA No. 13752 Law Offices of Kram & Wooster, P.S. 1901 South I Street Tacoma, WA 98405 rich@kjmmlaw.com connie@kjmmlaw.com	<input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> ABC Legal Messenger Service <input type="checkbox"/> Regular U.S. Mail <input type="checkbox"/> Other: <hr/>

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 1st day of October, 2015, at Seattle, Washington.



Angela Marino
Legal Assistant