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## I. Introduction

Joseph Alonso is a Mexican-American Gulf War veteran with service-related disabilities including a back injury and Post-Traumatic Stress Disorder (“PTSD”). He also suffers from a speech impediment unrelated to his military service. After a decade of exemplary service as a technician for Qwest, a new supervisor, Ben Martinez, began openly harassing Alonso.

Martinez, himself a veteran, openly told Alonso, “I will tell you what I hate, people that served in the First Gulf War for five days and claim a disability.” Alluding to Alonso’s PTSD, Martinez would talk about “crazy veterans” and ask Alonso, “Are you crazy or something?” Martinez also referred to Mexicans as “spics” in Alonso’s presence. He mocked Alonso about his speech, asserting that Alonso talked like a “ghetto Hispanic.” The work environment under Martinez’s leadership was replete with this type of vulgar language and Martinez made no effort to correct it.

Frustrated and seeking to stop the harassment, Alonso called Qwest’s “Advice Line” to report his concerns. Instead of resolving the issue, Martinez got wind of the complaint and retaliated against Alonso. Almost immediately, Martinez removed Alonso from a preferred field customer support position he had been

selected for two years earlier — before Martinez became his supervisor. Ostensibly due to this change in position, Alonso's vehicle, one of the nicer ones in the fleet, was taken from him and replaced with a dilapidated truck. He lost his office, his laptop, and even his cellular phone. Martinez also subjected Alonso to vastly heightened scrutiny of his work performance. Co-workers who submitted declarations in support of Alonso had no doubt about what was going on: Martinez was trying to make Alonso's work as miserable as possible so he would quit.

Alonso ultimately filed suit asserting claims of discrimination based on his veteran status, national origin and disability, as well as retaliation claims, all under RCW Chapter 49.60, Washington's Law Against Discrimination ("WLAD"). CP 1-8. Alonso asks this Court to reverse the trial court's order dismissing his claims on summary judgment and to remand his claims for trial.

## II. Assignments of Error and Related Issues

**Assignment of Error No. 1:** The trial court erred in dismissing Alonso's disparate treatment discrimination claims based on his protected statuses as a military veteran, Mexican-American, and/or disabled person.

*Issue 1.1.* A prima facie case of discrimination is established by showing direct evidence of discriminatory intent. Biased remarks by an employer constitute such direct evidence because they raise an inference of discrimination. Here, Alonso is a Mexican-American

disabled war veteran with a speech impediment. His supervisor expressed hatred for veterans receiving disability, referred to Mexicans as “spics,” and mocked him for speaking like a “ghetto Hispanic.” Is there a question of fact on discrimination? *Yes.*

*Issue 1.2* *McDonnell Douglas* burden shifting applies only when there is no direct evidence of discriminatory motive. Here, the employer’s agent openly expressed his animus for and used bigoted terms to describe Alonso. Should the court dispense with the *McDonnell Douglas* analysis in light of this direct evidence of discriminatory motive? *Yes.*

*Issue 1.3* Under *McDonnell Douglas*, a plaintiff must show he suffered an adverse employment action. Transfers of job duties without a loss of pay or status, heightened scrutiny, or imposition of a hostile work environment is sufficient to constitute adverse action. Alonso was transferred to a less desirable position, subjected to heightened scrutiny, and subjected to a hostile work environment. Assuming *McDonnell Douglas* applies, is there a factual question as to whether Alonso suffered an adverse employment action? *Yes.*

**Assignment of Error No. 2:** The trial court erred in dismissing Alonso’s hostile work environment discrimination claims based on his protected statuses as a military veteran, Mexican-American, and/or disabled person.

*Issue 2.1* To establish a hostile work environment, an employee must show that unwelcome harassment, directed at the employee because of his protected status, affected the terms or conditions of his employment. Whether harassing or racist comments affect the terms and conditions of employment is a question of fact. Alonso visited a doctor because his PTSD symptoms were aggravated by stress from workplace harassment. Is there a factual question as to whether Alonso’s employment was sufficiently affected? *Yes.*

*Issue 2.2* Harassment must be imputable to the employer. Where the harasser is a manager, the conduct is imputable on this basis alone. Harassment is also imputed if the employer knew or should have known it was occurring and did not remedy it. Here, Alonso was harassed by his direct supervisor and made multiple, documented complaints to Qwest about prejudice, mistreatment, and retaliation. Is there a factual question as to whether the harassment is imputable? *Yes*.

**Assignment of Error No. 3:** The trial court erred in dismissing Alonso's retaliation claim under RCW 49.60.210.

*Issue 3.1.* An employee demonstrates retaliation by showing that he (1) engaged in protected activity; (2) suffered an adverse employment action; and (3) a causal link. Whether an action is retaliatory is generally a fact question based on timing and surrounding circumstances. Here, Alonso complained about what he reasonably believed was discrimination. His manager threatened to punish Alonso, he was immediately transferred from his preferred position, lost privileges, and was subjected to heightened scrutiny and express threats. Is there a factual question as to whether Alonso was subject to retaliatory acts? *Yes*.

### III. Statement of the Case

Joseph Alonso is a Mexican-American veteran of the Gulf War. CP 233. He was an Army Airborne Ranger and receives partial disability due to service related back injuries he sustained while jumping out of an airplane. CP 51, 233. In addition, having witnessed horribly violent scenes during his service, Alonso suffers from PTSD, for which he also receives partial disability. CP 233. Beyond his military service disabilities, Alonso also

struggles with a speech impediment that can make him difficult to understand. His coworkers confirmed this. CP 140, 142, 144.

**A. An Exemplary Qwest Employee, Alonso Was Granted a Favorable Assignment Working for a Customer Service Support Group.**

Alonso began his employment with Qwest in May 1999 as a Central Office Equipment Installation Technician. CP 55, 231. He is an excellent employee as confirmed by several of his coworkers:

- Juanita Wright, a Qwest employee for 41 years, described Alonso as “one of the most diligent workers that [she] ever worked with at Qwest.” CP 138.
- William Kling, a Qwest employee for 41 years, said that Alonso “took his employment seriously, always wanting to provide good product support” to customers; CP 141-42.
- Margaret Buechel, a Qwest employee for 33 years, said Alonso “was very conscientious about his work,” concerned with quality, and “wanted to please the customer. CP 143-44.

After providing seven years of high quality service, Alonso was chosen to work with customers outside the central office. CP 232. His new group, the AQCB, is essentially a customer service support group. *Id.* Alonso’s supervisor acknowledges that this position came with “some benefits.” CP 47. Alonso liked this “customer premises” work better than working at the central office. CP 113. Even before being selected for the AQCB group,

Alonso was given an attractive van to drive, had a cell phone, an office at Qwest, and a computer. CP 232.

**B. After Working Successfully at Qwest for a Decade, Issues Arose When a New Manager, Ben Martinez, Began Harassing Alonso.**

Bernardo "Ben" Martinez was hired by Qwest in 2007, and became Alonso's supervisor in 2008. CP 46, 232. Almost immediately, Martinez encouraged and participated in creating a hostile work environment for Alonso based upon his veteran status, disabilities, and national origin. *See, e.g.*, CP 233. 240. Martinez surrounded himself with workers who would harass and discriminate Alonso and encouraged their participation in the harassing conduct. CP 232.

Martinez was aware that Alonso was a combat veteran of the First Gulf War and that he was receiving disability benefits related to that service. CP 51, 233. Martinez, who is himself a veteran, made several comments about his distaste for those who received disability for war service stating, "I served and I got crap." CP 233

The notion that Alonso was getting something that Martinez was not clearly bothered Martinez and he took it out on Alonso. He told Alonso, "I will tell you what I hate, people that served in

the First Gulf War for five days and claim a disability.” CP 233. He asked Alonso, “Did you know Vietnam was over in 1978?” *Id.* And Martinez also made comments to Alonso about “crazy veterans,” alluding to Alonso’s PTSD, and asked Alonso, “Are you crazy or something?” *Id.* From these and other comments, Alonso perceived that Martinez had a “clear disdain for those who actually served in war.” *Id.* Clearly Martinez expressed distaste and disgust for Alonso’s disability.

In addition to mocking Alonso for his military service and disabilities, Martinez would also harass Alonso based on his Mexican heritage and speech. CP 240. Martinez and others referred to Mexicans as “spics” in the presence of Alonso. CP 4, 114-15, 240. Management took no action. CP 240.<sup>1</sup>

Much of the racial harassment centered on Alonso’s speech difficulties. Martinez referred to Alonso as speaking like a “ghetto Hispanic.” CP 144. When coworker Margaret Buechel tried to explain that Alonso had a speech impediment, Martinez stated that Alonso simply did not speak “good English” and called Buechel “naïve” for believing otherwise. *Id.* Martinez also felt it

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<sup>1</sup> While Martinez denies ever using the word “spic,” CP 50, this is another factual dispute that should have been decided by the jury, not the trial court.

important to point out that his own mother made sure that he did not acquire a “Mexican accent.” CP 3, 240.

Martinez allowed his friends and subordinates to join in on the harassment. CP 140. José Zuniga would mock Alonso’s speech by pretending to talk like him. CP 142. Zuniga would proclaim that he “spoke correct English,” unlike Alonso. CP 145. Others would tell Alonso “this is not Mexico.” CP 240.

**A. Alonso complains to Qwest’s “Advice Line” but no action is taken.**

At wits’ end, Alonso called Qwest’s Advice Line “to report his concerns about his mistreatment, vulgar language, and corruption. CP 233. While there are notes from Qwest relating to the various calls to the Advice Line, Alonso explains that the notes were not complete as to his comments and complaints. CP 233–34. For instance, during his deposition, Alonso repeatedly and specifically testified that he reported “prejudice” to the hotline. CP 108. Qwest’s Advice Line notes—those that were not redacted<sup>2</sup>—make no mention of a report of prejudice.

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<sup>2</sup> Qwest claimed privilege as to this “investigation” and redacted the related content in its document production. CP 73–74.

Nonetheless, the notes indicate that Martinez was the focus of the complaints.<sup>3</sup>

Alonso's initial report was April 30, 2010. CP 80-81, 233. He explained to the Advice Line operator that he was being singled out for treatment that others did not endure. CP 234. The notes document that Alonso reported "Ben Martinez allows inappropriate behavior in the workplace." *Id.* at 81. The notes mention "vulgar conversation," "profanity," and favoritism shown to those who participate and laugh. *Id.* Alonso also explained that he had not previously reported the harassment to management because he did not feel comfortable doing so. *Id.*

In total, Alonso made seven calls to the Advice Line between April 30 and May 25, 2010. CP 73-87. During Alonso's final call with the Advice Line, he described threats and heightened scrutiny by Martinez and, at the close of the call, informed the Advice Line that he had hired an attorney. CP 86. The Advice Line operator noted this as one of her "concerns" at the end of her notes. *Id.*

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<sup>3</sup> This was not the first discrimination or HR investigation at Qwest involving Martinez. Three prior complaints had been investigated regarding Martinez, one in 2007 and two in 2008. CP 75.

Following this revelation, Qwest, for the first time, actually referred the matters to upper management and HR, stating “we are now beginning an investigation.” *Id.* Unsurprisingly, Qwest’s internal investigation found *no* evidence of harassment, a conclusion Alonso obviously disputes. CP 59–60.

**C. After Engaging in Protected Activity Alonso Is Unfairly Scrutinized, Harassed, Transferred, and His Work Equipment Is Taken Away.**

The situation worsened for Alonso after he called Qwest’s Advice Line. Retaliatory action by Martinez was overt and swift. Even though the hotline was supposed to be confidential, Martinez was made aware of the Alonso’s complaints and he further targeted Alonso as a result.

The day following Alonso’s April 30th complaint to the Qwest Advice Line, Martinez held a safety meeting. CP 234. At the meeting, Martinez announced that “someone had called in” to the hotline and then Martinez listed off the very three complaints Alonso had made. *Id.* Three or four times, Martinez cautioned everyone to be “careful” because he was being investigated. CP 145. Martinez went on to openly state his retaliatory intent, telling the group: “Someone is throwing rocks at the big dog, that big dog is going to get you, and that big dog is me.” *Id.*

**1. Alonso's work is subjected to heightened scrutiny.**

Immediately after Alonso complained to the Advice Line about being singled out, Martinez began scrutinizing Alonso even further and singling him out for additional work that others were not tasked with. On May 11, 2010, less than two weeks after Alonso's complaint, Martinez called Alonso at a worksite, told him to drop what he was doing, and "do whatever it takes" to complete a special project at another location. CP 235. After Alonso put in an 11-hour day to complete the special project at Martinez's direction, he was chastised by Martinez for failing to seek approval for this overtime. *Id.* Martinez never required other employees to get pre-authorization for overtime. CP 236. Alonso alone was singled out for that requirement. *Id.*

On another occasion, Martinez emailed Alonso to come to the warehouse to clean up his "mess." CP 237, 246. Alonso, who was notorious for keeping a clean workspace, *e.g.* CP 142 ("organized and efficient in his work"), had set two boxes neatly aside for a coworker who needed them. CP 237. Martinez ignored other workers who were actually messy and left their workspaces in disarray, while singling Alonso out for verbal reprimands and harassment over this issue. *Id.*

These and other examples of close supervision persisted. Following the Advice Line complaint, Martinez would constantly call Alonso throughout the day checking up on him. *Id.* Alonso was also required to call and report to Martinez before and after he started each job. *Id.* This, too, was not required of other employees and directly impacted the Alonso's terms and conditions of employment and the ability to complete his work. *Id.*

This heightened scrutiny did not go unnoticed by others. For instance, coworker Juanita Wright notes that Martinez "would focus on Joseph's performance and scrutinize Joseph's work to a higher level than other employees." CP 139. "It was evident in the way that Ben Martinez treated Joseph Alonso that he did not like him and that he was trying to make Joseph's working conditions so poor that Joseph would quit." CP 140. Similarly, Margaret Buechel states "[i]t was obvious from the way that Ben was acting towards Joseph that he knew that Joseph had complained." CP 145. She further explains the impact of this scrutiny: "After Ben started looking at Joseph, negative things began to happen to Joseph." *Id.*

**2. Martinez looks the other way as his subordinates play “practical jokes” on Alonso.**

Martinez also stood by while coworkers continued to harass Alonso. On one occasion, coworkers placed a “gooey liquid” — perhaps saliva or hand sanitizer — on the receiver of Alonso’s phone. CP 78. On another occasion, Jose Zuniga glued Alonso’s mouse to the mouse pad. CP 145. Another time, a greasy substance was placed on Alonso’s mouse. *Id.* On yet another occasion, Alonso found a puddle of liquid on his office chair. CP 240. Other employees perceived that Martinez allowed his friends to get away with these “practical jokes” to harass Alonso. CP 145.

**3. Alonso is transferred out of his AQCB position, back to the central office where he began his career.**

During the two years that Alonso worked in the AQCB, he achieved the distinction of being first in quality and productivity over a 14-state region. CP 232. In fact, Alonso was so successful in AQCB that he was told by his superiors that he would be made the AQCB trainer. CP 238. This of course changed after Alonso complained to the Advice Line. Alonso was transferred back to the central office. *Id.* Martinez’s friend, Brad Tuttle, was given Martinez’s AQCB job. *Id.*

Qwest explains that the purpose of this transfer was simply to rotate other employees through and train them as AQCB's. However, since Alonso was removed from his job, no other employees have held or been trained in the AQCB position. CP 238. Two years later, Brad Tuttle remains in Alonso's job. *Id.* Co-worker Margaret Buechel explains what she observed as follows: "After Joseph complained about [Martinez], Joseph's job was taken away from him. I think that Ben wanted to show Joseph who was the boss . . . ." *Id.*

#### 4. Equipment is taken from Alonso.

As if the heightened scrutiny, harassment, and demotion were not enough, Martinez added insult to injury by taking away the equipment Alonso needed to do his work. Most notably, the handsome van that Alonso had been given was replaced with not just a shabby truck, but a dilapidated one. CP 236. The replacement had 240,000 miles, a badly cracked windshield, worn out brakes, steering problems, broken locks, and various other cosmetic deficiencies. *Id.* Alonso believes that he was assigned this particular vehicle for a very particular reason: to humiliate him. *Id.*

Alonso also lost his office. CP 240. Though he worked for a major telecommunications company, his cell phone was taken away. CP 239. This, too, made his job more difficult. *Id.*

Qwest argues that the nicer van was intended for the AQCB group (the position Alonso should not have been removed from in the first place). But that is incorrect. The van was assigned to Alonso several months *before* he was selected for the AQCB position in 2006. CP 232. It was only taken from Alonso after his complaints. *Id.* Similarly, Alonso's co-workers had the simple privilege of a company cell phone. CP 239, 248-55. A privilege Alonso also had before he complained.

**D. The Stress of the Workplace Harassment Affected Alonso's Employment and Aggravated his PTSD.**

By June 2010 Alonso sought mental health care from a counselor. CP 236, 242-43. Due to the extreme stress he was under in the workplace from the harassment and retaliation, Alonso reported experiencing anxiety, hyperarousal, nightmares, and reported other enhanced PTSD symptoms. *Id.*

**IV. Argument**

The purpose of WLAD "is to deter and to eradicate discrimination in Washington." *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). The Supreme Court has

repeatedly recognized that the WLAD “embodies a public policy of the highest priority.” *Martini v. Boeing Co.*, 137 Wn.2d 357, 364, 971 P.2d 45 (1999) (internal quotation marks omitted). The statute mandates a liberal construction to accomplish its remedial purposes. RCW 49.60.020.

In enacting WLAD, the Legislature expressly found and declared that discrimination due to national origin, veteran status or disability, “threatens not only the rights and proper privileges of [Washington’s] inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. Thus, employers are prohibited from “discriminat[ing] against any person in compensation or in other terms or conditions of employment” based on these characteristics. RCW 49.60.180(3).

Here, Alonso was subjected to a hostile work environment when he was ridiculed as a Mexican, a disabled military veteran, and an individual with a speech impediment. He suffered disparate treatment as well — he was treated differently by a manager who had openly mocked and professed his hatred for Alonso. When Alonso stood up and complained about this illegal conduct, he faced retaliation and further humiliation — precisely the conduct that the Legislature sought to eradicate through

WLAD. The trial court erred in dismissing Alonso's claims on summary judgment. This Court's review of the trial court's decisions is *de novo*. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011).

**A. Summary Judgment Should Not Be Granted Where Substantial Evidence Supports the Discrimination and Retaliation Claims.**

Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” *Id.* (quoting CR 56(c)). All disputed facts and inferences from those facts must be viewed in favor of Alonso, the non-moving party. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005). “[S]ummary judgment should only be granted if a reasonable person would reach but one conclusion.” *Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 223, 45 P.3d 186 (2002).

“[T]he presence of discrimination is ultimately a factual question.” *Shannon v. Pay ‘N Save Corp.*, 104 Wn.2d 722, 728, 709 P.2d 799 (1985). In discrimination cases, summary judgment is therefore inappropriate where “a reasonable trier of fact could, but not necessarily would, draw an inference that an impermissible motive came into play . . . .” *Stevens v. City of*

*Centralia*, 86 Wn. App. 145, 157, 936 P.2d 1141 (1997) (internal quotation marks omitted).

“Summary judgment should be rarely granted in employment discrimination cases.” *Sangster v. Albertson’s, Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000) (citing *Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996)). Courts “‘require very little evidence to survive summary judgment’ in a discrimination case, ‘because the ultimate question is one that can only be resolved through a “searching inquiry” — one that is most appropriately conducted by the factfinder, upon a full record.’” *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1564 (9th Cir. 1994) (quoting *Sischo-Nownejad Merced Cmty. Coll. Dist.* 934 F.2d 1104, 1111 (9th Cir. 1991)). Alonso has presented “evidence which calls into question the defendant’s intent” raising a genuine issue of material fact sufficient to preclude summary judgment. *deLisle v. FMC Corp.*, 57 Wn App. 79, 83, 786 P.2d 839 (1990).

**B. Alonso Established a Prima Facie Disparate Treatment Claim Based on Direct Evidence and under *McDonnell Douglas*.**

“Disparate treatment is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or

[other protected characteristic].” *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (internal quotations omitted). To establish a prima facie case of disparate treatment discrimination the plaintiff “must show that his employer simply treats some people less favorably than others because of their [protected status].” *Johnson v. Dep’t of Soc. and Health Servs.*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996) (internal quotation marks omitted).

There are two methods by which Alonso may establish a prima facie case of discrimination: (1) direct evidence of discriminatory intent or (2) the test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 491–92, 859 P.2d 26 (1993) (“The *McDonnell Douglas* standard and the direct evidence method are merely alternative ways of establishing a prima facie case.”)

The *McDonnell Douglas* burden shifting approach was developed in recognition of the fact that “[d]irect, smoking gun evidence of discriminatory animus is rare, since [t]here will seldom be eyewitness testimony as to the employer’s mental processes[.]” *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179–80, 23 P.3d 440 (2001) (internal quotation omitted). Indeed,

“employers infrequently announce their bad motives orally or in writing.” *Id.* at 179 (quoting *deLisle*, 57 Wn App. at 83).

Here, however, Martinez took the rare step of verbalizing his animus toward Alonso—expressing his hatred of disabled veterans, using overtly racist terms like “spic,” mocking Alonso’s speech impediment or “Mexican accent” to his face, and acquiescing to similar harassment by others. This raises inferences about Martinez’s motives in treating Alonso less favorably and the court need not even reach the *McDonnell Douglas* analysis. But, even under *McDonnell Douglas*, Alonso establishes a prima facie case of disparate treatment discrimination. Summary judgment was therefore improper.

**1. Statements by Alonso’s manager are direct evidence of discriminatory intent.**

“[A] prima facie case of discrimination can be established by showing direct evidence of discriminatory intent.” *Kastanis*, 122 Wn.2d at 491. “This analysis requires only that an employee produce direct evidence that discriminatory animus was a substantial factor in the decision at issue.” *Griffith v. Schnitzer Steel Indus. Inc.*, 128 Wn. App. 438, 447 n. 4, 115 P. 3d 1065 (2005); *see also Kastanis*, 122 Wn.2d at 491. “[I]f a plaintiff is able to produce direct evidence of discrimination, he may prevail

without proving all the [*McDonnell Douglas*] elements . . . .”  
*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511, (2002) (citing  
*TWA, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (“the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination”)).

When a plaintiff . . . seeks to establish a prima facie case through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer’s motive; *any* indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a factfinder.

*Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1409, (9th Cir. 1996) (emphasis added) (internal quotation marks omitted); *see also Blue v. Widnall*, 162 F.3d 541, 546 (9th Cir. 1998) (“with direct evidence, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial”).

Discriminatory remarks by an employer are generally considered direct evidence of discrimination. For example, in *Johnson v. Express Rent & Own, Inc.*, this Court reversed summary judgment for the employer based on ageist comments. 113 Wn. App. 858, 862–63, 56 P.3d 567 (2002). There, the plaintiff’s direct—and only—evidence of age discrimination was certain comments by supervisors about fitting the “image for the

company” and “a youthful, fit, GQ looking mold.” *Id.* at 862. This Court held the plaintiff “produced sufficient evidence of conscious wrongdoing by Express and that a jury could find a discriminatory motive behind” the decision at issue. *Id.* at 863.

The Ninth Circuit has also recognized biased remarks by decision makers as direct evidence of discrimination. In *Cordova v. State Farm Insurance Co.*, a manager’s single reference to an insurance agent—not even the plaintiff—as a “dumb Mexican” precluded summary judgment. 124 F.3d 1145, 1149 (9th Cir. 1997) (reversing trial court). “Such derogatory comments can create an inference of discriminatory motive.” *Id.* (citing *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995) (fire chief’s derogatory comments about Hispanics create inference of discriminatory motive); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) (supervisor’s remarks indicating sexual stereotyping create inference of discriminatory motive)).

In *Chuang v. University of California Davis, Board of Trustees*, the court held that a single racist comment by an individual with managerial authority was sufficient direct evidence of discrimination to survive summary judgment. 225 F.3d 1115, 1128 (9th Cir. 2000). There, a member of the University’s

Executive Committee stated “two Chinks” in the pharmacology department were “more than enough.” *Id.* The court reiterated that “[t]he plaintiff is required to produce ‘very little’ direct evidence of the employer’s discriminatory intent to move past summary judgment.” *Id.* (citations omitted). Based on the racist comment, the court held that the plaintiffs “easily clear this threshold.” It reasoned: “We need not dwell on the offensiveness of the term used. It is ‘an egregious and bigoted insult, one that constitutes *strong evidence of discriminatory animus* on the basis of national origin.’” *Id.* (quoting *Cordova*, 124 F.3d at 1149) (emphasis added).

Here, in keeping with these cases, Alonso provided sufficient direct evidence in the form of the express discriminatory statements made by Martinez. He expressed his hatred of disabled veterans. He called Mexicans “spics”—“an egregious and bigoted insult”—and allowed others to do the same. He even ridiculed Alonso’s speech difficulties, saying Alonso spoke like a “ghetto Hispanic.” Martinez also allowed others to mock Alonso’s speech. All of this is overwhelming, direct evidence that Martinez harbored animus toward Alonso *based* on Alonso’s protected

status. It was therefore reversible error for the trial court to dismiss his claims on summary judgment.

**2. Alonso also presented a prima facie case of discrimination under the *McDonnell Douglas* analysis.**

Where a plaintiff, unlike Alonso, lacks direct evidence of discriminatory animus, he may establish a prima facie case under the *McDonnell Douglas* burden shifting approach. *Kastanis*, 122 Wn.2d at 490. As previously noted, the *McDonnell Douglas* test was established “to ‘compensate for the fact that direct evidence of intentional discrimination is hard to come by.’” *Hill*, 144 Wn.2d at 180 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O’Connor, J., concurring)).

Under *McDonnell Douglas*, a plaintiff establishes a prima facie case if “(1) he belongs to a protected class, (2) he was treated less favorably in the terms or conditions of his employment (3) than a similarly situated, nonprotected employee, and (4) he and the nonprotected ‘comparator’ were doing substantially the same work.” *Johnson v. Dep’t of Soc. and Health Servs.*, 80 Wn. App. at 227 (applying *McDonnell Douglas* framework in a demotion case). The burden then shifts to the defendant to establish a legitimate, non-discriminatory reason for

the less favorable treatment. *Id.* If this occurs, plaintiff then may produce evidence to show the proffered reason is pretextual.

“The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence.” *Hill*, 144 Wn.2d at 180 (internal quotation marks omitted). “[I]t should not be viewed as providing a format into which all cases of discrimination must somehow fit. The Supreme Court has made it abundantly clear that *McDonnell Douglas* was intended to be neither ‘rigid, mechanized, or ritualistic,’ nor the exclusive method for proving a claim of discrimination[.]” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363, 753 P.2d 517 (1988) (internal citations and quotation marks omitted).

Once the plaintiff has established a prima facie case and the defendant has produced evidence of a nondiscriminatory reason for its action, the burden-shifting scheme “drops from the case”. . . . The plaintiff then bears the burden of proving the ultimate fact—that the defendant intentionally discriminated against the plaintiff.

*Kastanis*, 122 Wn.2d at 491–92.

Here, Alonso is a member of distinct protected classes. He is of Mexican heritage, a disabled military veteran, and suffers from what others perceive as a speech impediment. He was treated

less favorably by Martinez, who transferred him to a less desirable job, unfairly scrutinized his work, and allowed him substandard equipment with which to perform his work. Others performing the same work, but not similarly situated to Alonso, were not subject to the same less favorable treatment.

**a. Alonso is a member of several protected classes.**

The WLAD protects Alonso as a Mexican–American, a veteran, and a disabled person. RCW 49.60.010; 49.60.180(3).

Moreover, the WLAD prohibits employment discrimination based on *perceived* disability. RCW 49.60.010; WAC 162-22-020(2)

(“The presence of a sensory, mental, or physical disability includes, but is not limited to, circumstances where [such a condition is] perceived to exist whether or not it exists in fact.”); *Hill*, 144 Wn.2d at 191.

“[T]he issue of whether a person is handicapped under [WLAD] is a question of fact for the jury.” *Phillips v. City of Seattle*, 111 Wn.2d 903, 910, 766 P.2d 1099 (1989). Whether a perceived disability exists is a factual question regarding the perceptions of the employer. *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 810, 6 P.3d 30 (2000).

Here, Alonso's speech difficulties implicate two protected statuses: his Mexican heritage and disability separate from his Gulf War injuries or veteran status. Qwest argues that the declarations of three of Alonso's coworkers describing Alonso's speech should be stricken because they are not qualified to distinguish between an accent and a speech impediment. The dubious merits of this assertion notwithstanding, it are a distinction without difference for the purposes of the WLAD. If Martinez and his cohorts were mocking Alonso for his accent, this constitutes discrimination based on national origin. If they were mocking Alonso over his speech impediment, or even what they perceived as a speech impediment, then this constitutes disability discrimination. A finder of fact, who can hear live testimony and weigh the credibility of the evidence, is far better suited to determine the nature and extent of this particular brand of harassment.

**b. Alonso was treated less favorably in the terms or conditions of his employment**

Although WLAD and Washington case law simply prohibit "treat[ing] some people less favorably than others," some courts have required employees to show "an adverse employment action." *Compare Johnson v. Dep't of Soc. and Health Servs.*, 80

Wn. App. at 227 with *Kirby v. City of Tacoma*, 124 Wn. App. 454, 468, 98 P.3d 827 (2004). These standards are not distinct, however, because Washington courts have broadly defined “adverse employment action.” The definition encompasses acts well beyond termination, including demotion or transfer. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002).

The Ninth Circuit has likewise holds that a “wide array of disadvantageous changes in the workplace constitute adverse employment actions.” *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). Transfers of job duties — even a lateral transfer without a loss of pay or status — may constitute an adverse employment action. *Id.* at 1241 (citing *Yartsoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *St. John v. Employment Dev. Dep’t*, 642 F.2d 273, 274 (9th Cir. 1981) (transfer “to another job of the same pay and status” was adverse action). Unfair scrutiny and undeserved performance ratings are similarly actionable adverse employment actions. *Id.* (citing *Yartsoff*, 809 F.2d at 1376 (undeserved ratings); *see also Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007) (initiation of investigation and subsequent transfer); *Ray*, 217 F.3d at 1241 (citing *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997) (unfavorable job

reference); *Strother v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996) (exclusion from meetings and denial of secretarial support)). “[T]he severity of an action’s ultimate impact (such as loss of pay or status) goes to the issue of damages, not liability.” *Ray*, 217 F.3d at 1243 (citing *Hashimoto*, 118 F.3d at 676).<sup>4</sup>

Consistent with these authorities, a discriminatory hostile work environment, which necessarily requires “treat[ing] some people less favorably than others,” is itself an “adverse employment action” for the purposes of WLAD. As this Court has recognized, “discrimination requires ‘an actual adverse employment action, such as a demotion or adverse transfer, *or a hostile work environment that amounts to an adverse employment action.*’” *Kirby*, 124 Wn. App. at 465 (quoting *Robel*, 148 Wn.2d at 74 n.24);<sup>5</sup> *see also Harrell v. Wash. State ex rel. Dep’t of Soc. & Health Servs.*, \_\_\_ Wn. App. \_\_\_, 285 P.3d 159, 166 (2012).

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<sup>4</sup> The Supreme Court’s definition of adverse employment action as articulated in *Burlington Northern & Santa Fe R.R. Co. v. White*, 548 U.S. 53 (2006), is further explained in the analysis of Alonso’s retaliation claims. *See infra* at 42-44.

<sup>5</sup> The *Kirby* opinion’s citation to footnote 24 of the *Robel* decision appears to be an error. There is no footnote 24 in *Robel*. The correct citation, apparently, is to footnote 14 of the dissent.

Here, Alonso shows he suffered an adverse transfer, heightened scrutiny, and a hostile work environment. First, Alonso lost his AQCB position and was returned to the central office assignment where he began his career. The record establishes that the AQCB position was one for which Alonso was specifically chosen, CP 232, a position he preferred, CP 113, and that Martinez acknowledges had “some benefits.” CP 47. A co-worker agreed that Alonso having his job “taken away from him” was viewed as a “negative” thing. CP 145.

Martinez also subjected Alonso’s work to heightened scrutiny. Unlike other employees under Martinez’s control, he required Alonso to obtain pre-authorization before working necessary overtime. He criticized Alonso for being “messy” even though his work areas were immaculate. Martinez constantly monitored Alonso, requiring him to call in at the beginning and end of each shift and calling him throughout the day. None of this was required of the other workers Martinez supervised and it did not go unnoticed by Alonso’s coworkers.

Finally, as detailed in the following section, the hostile work environment Alonso endured was based on one or more of his protected statuses. Indeed, Martinez made direct, derogatory

comments implicating *each* of Alonso's protected characteristics as a motive. This alone amounts to an adverse employment action.

Viewed in the light most favorable to Alonso, the evidence shows that Alonso was deprived of his preferred and beneficial position and that his transfer was motivated by Martinez's discriminatory animus toward Alonso. Similarly, a jury could reasonably conclude that the harassment directed at Alonso was motivated by the same animus.

**c. Alonso was treated differently than coworkers who were not disabled, Mexican-American, veterans.**

Qwest does not dispute that Alonso was the only employee under Martinez's supervision with a disability based on a back injury. Nor does it dispute that Alonso was the only employee under Martinez's supervision with PTSD. Nor does Qwest dispute that Alonso was the only employee under Martinez's supervision with a speech impediment. Nor does Qwest dispute that Alonso was the only employee under Martinez's supervision whose "Mexican accent" created communication difficulties. There is ample evidence that Alonso was a highly competent employee. Taking any one of the derogatory comments made or endorsed by Martinez, and the subsequent mistreatment suffered by Alonso in

the light most favorable to Alonso, a reasonable finder of fact could conclude that discrimination occurred. This alone is sufficient to survive summary judgment.

Without citation to authority, Qwest argued below that “it defies common sense” to conclude that Martinez targeted Alonso based on his status as a veteran because Martinez himself is a veteran. CP 37-38. No legal authority supports Qwest’s untenable argument; a member of a protected class can never discriminate based on the same protected characteristic.

Qwest suggests that minorities, immigrants, the disabled, and so on can never discriminate amongst themselves and even if they did, the WLAD would provide no remedy. But nothing in the plain language of the act suggests such an absurd conclusion. Nor would the public policy underlying the WLAD be served if different rules applied to the very individuals the act aims to treat equally.

Though direct evidence makes it unnecessary, if the Court applies the flexible *McDonnell Douglas* analysis, Alonso satisfies all elements. While Qwest has and will continue to excuse the discriminatory conduct of its agent as legitimate, Alonso has responded with specific evidence demonstrating that these

explanations are pretextual. *McDonnell Douglas* therefore “drops from the case” so that a finder of fact may determine if Martinez treated Alonso differently because he is a disabled veteran, Mexican–American, or suffers from a speech disability.

**C. Alonso Submitted Ample Evidence to Support His Hostile Work Environment Claim.**

Employees have a “right to work in an environment free from discriminatory intimidation, ridicule, and insult.” *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). “It is enough if such hostile conduct pollutes the victim’s workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position.” *Id.* at 1113 (internal quotation marks omitted).

A plaintiff demonstrates a hostile work environment claim by setting forth evidence that the harassment (1) was unwelcome, (2) was directed at him because of his protected status; (3) affected the terms or conditions of his employment, and (4) is imputable to the employer. *Robel*, 148 Wn.2d at 44–45; *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 84, 98 P.3d 1222 (2004).

Here, it is undisputed that Alonso found unwelcome mockery and ridicule of his Mexican heritage, status as a disabled veteran, or his speech impediment. Nor did he welcome the various pranks targeted at him. The direct statements of Martinez and Alonso's coworkers raise, at a minimum, questions of fact as to whether this harassment was based on Alonso's protected classes. Alonso's repeated complaints to HR and visit to his doctor because his PTSD symptoms were aggravated by stress at work demonstrate that the conditions of his employment were not merely affected in a "trivial" way. Finally, Martinez's status as both a manager and harasser imputes his conduct to Qwest.

**1. Statements by Alonso's supervisor and coworkers demonstrate that the harassment was based on animus toward his protected statuses.**

As noted, direct "smoking gun" evidence of discriminatory animus is rare since employers infrequently announce their bad motives. *Hill*, 144 Wn.2d at 179. Thus, to establish the second element of a hostile work environment claim, a plaintiff need only produce "evidence that supports a reasonable inference that [his status as a member of a protected class] was the motivating factor for the harassing conduct." *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 149, 931 P.2d 196 (1997).

Here, there is direct “smoking gun” evidence that Alonso was harassed because of his protected statuses. His manager verbally expressed his hatred for disabled veterans like Alonso. He referred to Alonso using derogatory terms like “spic” and “ghetto Hispanic.” Martinez openly mocked Alonso’s speech difficulties, and allowed others to do the same. As noted above, biased remarks by decision makers are compelling evidence of discriminatory animus that, at a minimum, raise a genuine issue of fact precluding summary judgment.

**2. The harassment affected Alonso’s employment—complaints to HR and aggravated PTSD are not “trivial” consequences.**

In evaluating the third element of a hostile work environment claim, courts “look to the totality of the circumstances to determine whether the harassment was ‘sufficiently severe and persistent to seriously affect the emotional or psychological well being’ of the employee.” *Graves v. Dep’t of Game*, 76 Wn. App. 705, 714, 877 P.2d 424 (1994) (quoting *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406, 693 P.2d 708 (1985)). Preferential treatment of employees outside the protected class is evidence of a hostile work environment. *See, e.g., Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 303–05, 898

P.2d 284 (1995) (reversing summary judgment for employer while considering privileges given only to male employees as evidence of hostile work environment for women).

Whether racist comments affect the conditions of employment is a question of fact. *Davis v. West One Auto. Group*, 140 Wn. App. 449, 457, 166 P.3d 807 (2007). In *Davis*, the plaintiff, “experienced racially charged comments in the workplace.” *Id.* at 453. Davis asserted that he was humiliated by these comments and claimed emotional distress. *Id.* at 457. Though there was no medical evidence, Davis’s frequent late arrivals to work, and his own testimony that he was “probably mentally sick, drained” raised an inference “that this was the result of a hostile work environment.” *Id.* at 458.

Here, the harassing conduct included the manner in which Alonso was treated as well as the specific adverse employment actions outlined above. Alonso provided testimony *and medical records*<sup>6</sup> indicating that these adverse actions affected his pre-existing PTSD and made it difficult to do his job in this work

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<sup>6</sup> Below, Qwest objected to the admissibility of the doctor’s progress notes as hearsay. But the relevant portions of the exhibit concern statements made by Alonso to his physician — most notably, that the stress at work has led to an increase of his PTSD symptoms. Statements made to a physician for the purposes of medical diagnosis and treatment are not hearsay. ER 803(a)(4).

environment. Other witnesses have objectively confirmed that Martinez singled out Alonso for mistreatment. This evidence vastly exceeds what was found sufficient to preclude summary judgment in *Davis*.

While Qwest characterizes the psychological impacts on a PTSD sufferer from repeated racist remarks, expressions of hatred, heightened and unfair workplace scrutiny, and frequent targeting for pranks as “trivial” or “casual,” Alonso disagrees. This is precisely the type of factual dispute that a jury must resolve.

**3. Martinez is a manager and his harassing conduct is imputed to Qwest, who was aware of the problem.**

Harassment is imputed to an employer in one of two ways. First, “[w]here an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof.” *Glasgow*, 103 Wn.2d at 407. Second, it can be imputed to the employer if the employer “authorized, knew, or should have known of the harassment and . . . failed to take reasonably prompt and adequate corrective action.” *Id.* “Managers are those who have been given by the employer the authority and power to affect the hours, wages, and working conditions of the employer’s workers.” *Robel*, 148 Wn.2d at 48 n.5. This clearly describes Martinez’s role.

Martinez was the source and ringleader of much harassment and he is unquestionably a manager. Martinez had authority over Alonso's position, hours, and overtime. CP 234-37. Liability is imputed to Qwest on this basis alone. Moreover, Qwest knew or should have known about the harassment based on Alonso's repeated complaints to the Advice Line hotline. Unsurprisingly, Qwest's internal records—those that have not been redacted—do not accurately reflect the complaints made by Alonso and Alonso disputes the accuracy of the same. CP 233-34. Qwest's internal investigation concluded there was no harassment to address. CP 59-60.

It should therefore come as no surprise that Qwest failed to correct the harassment. Qwest inaccurately asserted that "Alonso alleges no instances of harassment after May of 2010." This is not correct. Alonso's evidence clearly shows that he has continued to be the target of heightened scrutiny with documentary evidence as recent as September 2011. CP 239, 247.

Again, there is ample evidence in the record demonstrating a factual dispute between Alonso and Qwest—this time regarding what Qwest knew and the adequacy of its response. Because

there was sufficient evidence in the record from which a jury could find in Alonso's favor on the hostile work environment claims, and summary judgment should be reversed on this claim.

**D. Martinez Retaliated Against Alonso for Complaining About What Alonso Reasonably Believed to Be Discrimination.**

Washington law precludes retaliation against a party asserting a claim based on a perceived violation of his civil rights or participating in an investigation into alleged discrimination in the workplace. RCW 49.60.210(1). Specifically, the statute provides that it is unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter". *Id.* Because WLAD is liberally construed to accomplish its purpose. Courts "have held that a statutory mandate of liberal construction requires that we view with caution any construction that would narrow the coverage of the law." *Marquis*, 130 Wn.2d at 108.

"The same analysis applies to the anti-discrimination and anti-retaliation provisions of [WLAD]." *Allison v. Housing Auth. of City of Seattle*, 59 Wn. App. 624, 629, 799 P.2d 1195 (1990). Like discrimination claims, retaliation claims may proceed under either direct evidence or circumstantial evidence, and when

circumstantial evidence is proffered, the same *McDonnell Douglas* burden shifting test applies. *Id.*

An employee demonstrates a prima facie retaliation case by showing “that (1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee’s activity and the employer’s adverse action.” *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005). Whether retaliation was a substantial or motivating factor in an adverse employment action “generally presents a question of fact.” *White v. State*, 131 Wn.2d 1, 16, 929 P.2d 396 (1997); *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990); *see also Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003) (“Whether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the timing and the surrounding circumstances.”)

Here, the Court once again need not reach the *McDonnell Douglas* analysis because there is direct evidence of discriminatory motive. The bigoted comments already discussed are more than sufficient to raise a factual question for the jury as to whether Martinez not only discriminated against Alonso, but

retaliated against him. The day after Alonso's April 30<sup>th</sup> complaint Martinez announced he would "get" the person who complained about him. CP 145. Analysis of the circumstantial evidence is unnecessary. Even so, Alonso can establish a prima facie case.

**1. Alonso engaged in statutorily protected activity by reporting discriminatory conduct to Qwest.**

To establish that he engaged in "statutorily protected activity" by opposing any practice forbidden by WLAD, RCW 49.60.210(1), Alonso need only show that his complaints addressed conduct that was at least "arguably a violation of the law," not that his activity opposed "behavior that would actually violate the law against discrimination." *Estevez*, 129 Wn. App. at 798. It is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be unlawful discrimination, even if the underlying conduct is determined not to have been illegal discrimination. RCW 49.60.210; WPI 330.05.

Here, Alonso made seven separate phone complaints to Qwest's advice line in just three weeks. He complained of prejudice and unequal treatment.<sup>7</sup> The very purpose of Qwest's

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<sup>7</sup> Below, Alonso also explained that he believed the vulgar language in the workplace was, in part, motivated by his Christian values. CP 232. For instance, when Martinez explained Alonso's vulgarity complaint at a meeting, another employee immediately said "does that mean that I can no longer call him a faggot?" CP 234. Nothing was done. *Id.* Alonso does not appeal

Advice Line is to conduct investigations of possible discrimination at Qwest. Complaining to his employer, indeed, to the very department tasked with stamping out discrimination, certainly constitutes conduct in opposition to discrimination under WLAD.

**2. Conduct tending to deter victims of discrimination from coming forward is adverse employment action.**

The second element, an adverse employment action, is also satisfied. As discussed above with discrimination, courts define adverse employment action broadly. The Supreme Court agreed in *Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53, 68 (2006), holding that an adverse employment action includes any conduct that might dissuade a reasonable worker from making a charge of discrimination.

The Court declined to provide a list of acts that would or would not be an adverse action, but instead focused on whether the act would “deter victims of discrimination from complaining.” *Id.* “[T]he significance of any given act of retaliation will often depend upon the particular circumstance. Context matters.” *Id.* at 69. The court noted that depending on the context, a schedule change, a

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dismissal of his religious discrimination claims, his belief that he was being retaliated against for making complaints regarding his religious values was reasonable. This satisfies the protected activity element and this evidence further supports the first element of his retaliation claim.

reassignment of duties or the exclusion from events at work could be an adverse employment action. *Id.*

The Supreme Court recently revisited *White* in *Thompson v. North American Stainless, LP*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 863 (2011). In *Thompson*, an employee was allegedly fired as retaliation against his fiancée who had filed a charge against the employer. *Id.* at 866. In reversing summary judgment for the employer, the Supreme Court again held that “Title VII’s antiretaliation provision must be construed to cover a broad range of employer conduct . . . It prohibits any employer action that well might have dissuaded a reasonable worker from making or supporting a [discrimination] charge.” *Id.*

Such was the case in the Ninth Circuit even before *White*. In *Ray v. Henderson*, the Ninth Circuit adopted the EEOC’s standard that “an action is cognizable as an adverse employment action if it is reasonably likely to deter an employee from engaging in protected activity.” 217 F.3d 1234. Under this standard, “a wide variety of disadvantageous changes in the workplace constitute adverse employment actions.” *Id.* at 1240.

Adopting the rationale of the Second, Seventh, and Tenth Circuits, the Ninth Circuit held that a hostile work environment is itself a basis for a retaliation claim:

Harassment is obviously actionable when based on [membership in a protected class]. Harassment as retaliation for engaging in protected activity should be no different—it is the paradigm of adverse treatment that is based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.

*Id.* at 1245 (internal quotation marks omitted).

Here, the record, viewed in the light most favorable to Alonso, establishes that his situation worsened *after* complaining to Qwest's Advice Line about the harassment he was *already* experiencing. He lost his favored AQCB position *after* complaining. While he still had an office, it was vandalized. His vehicle and other equipment were taken away *after* he complained. And he was more closely scrutinized *after* making his complaint. CP 75. A finder of fact could reasonably conclude that Alonso's hostile work environment became *more* hostile after he made his complaints and constitutes a retaliatory adverse action.

**3. The close temporal proximity between Alonso's complaint and further mistreatment demonstrates causation.**

“Ordinarily, proof of the employer’s motivation must be shown by circumstantial evidence because ‘the employer is not apt to announce retaliation as his motive.’” *Kahn v. Salerno*, 90 Wn. App. 110, 130, 951 P.2d 321 (1998) (quoting *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991)). Causation can be inferred from the timing of the adverse actions. “Proximity in time between the adverse action and the protected activity, coupled with evidence of satisfactory work performance and supervisory evaluations suggests an improper motive.” *Id.* at 130–31; *see also Yartzoff*, 809 F.2d at 1376.

Here, Alonso’s seven complaints to Qwest occurred within a three week period between April 30, 2010 and May 25, 2010. Qwest’s own incomplete Advice Line records reflect that Alonso made multiple reports of “retaliation.” *See* CP 75, 77. This was protected activity, and a finder of fact can reasonably conclude that the additional harassment occurred *because* Alonso complained about discrimination and retaliation in the first place.

## V. Conclusion

WLAD was enacted to eradicate discrimination. The *McDonnell Douglas* protocol was developed to test the merits of discrimination claims based – as they often must be – on circumstantial evidence. It is not a rigid and inflexible standard and it was never intended to apply where employers openly broadcast their discriminatory animus.

Joseph Alonso is a military veteran with physical and psychological disabilities stemming from his service. He is a Mexican–American. And he suffers from a speech disability. His direct supervisor, Ben Martinez, announced his hatred of disabled veterans—calling Alonso “crazy” and belittling his receipt of disability benefits. Martinez referred to Mexicans as “spics.” And he mocked Alonso’s speech, saying he spoke like a “ghetto Hispanic.” Co-workers participated in this harassment.

When Alonso complained, his situation only worsened. He lost the preferred position that he had earned and in which he succeeded. He was singled out for heightened scrutiny – a reality not lost on multiple coworkers who could see through Martinez’s transparent bias.

This is discrimination. This is hostility motivated by difference. This is retaliation. It has no place in a Washington workplace. The trial court erred in summarily resolving multiple disputed issues of material fact against Alonso to conclude that this was something else. Alonso respectfully requests that this Court reverse the trial court's order granting summary judgment and allow his disparate treatment, hostile work environment, and retaliation claims to proceed.

Respectfully submitted this 14<sup>th</sup> day of November, 2012.

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 14, 2012, she placed with ABC Legal Messengers, Inc. a true and correct copy of the Brief of Appellant for hand delivery and via email to counsel of record as follows:

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

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