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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**JOSEPH ALONSO,**

**Appellant,**

**v.**

**QWEST COMMUNICATIONS COMPANY, LLC,**

**Respondent.**

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**RESPONDENT'S OPENING BRIEF**

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**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	3
A.    Alonso and His Employment with Qwest.....	3
B.    Alonso's Diverse Work Crew.....	4
C.    Alonso Is Reassigned to Central Office Work After Martinez Becomes Concerned with Excessive Overtime.....	5
D.    Martinez Calls a Crew Meeting.....	7
E.    Alonso Makes a Series of Internal Complaints to Rybicki, the Union, and the Qwest Employee Hotline.....	7
F.    Alonso Is Insubordinate and Disrespectful Towards Martinez and His Co-Workers.....	11
G.    Procedural History.....	12
ARGUMENT.....	13
STANDARD OF REVIEW.....	13
I.    ALONSO HAS NO VIABLE CLAIM FOR DISPARATE TREATMENT.....	13
A.    No Adverse Employment Action Occurred.....	14
1.    Alonso's Reassignment to Central Office Work Was Not an Adverse Employment Action.....	16
2.    The Purported "Heightened Scrutiny" Alonso Faced Was Not an Adverse Employment Action.....	19
3.    Alonso's Evidence of "Harassment" Does Not Amount to an Adverse Employment Action.....	20
B.    There Is Insufficient Evidence of Discriminatory Animus.....	22

**TABLE OF CONTENTS**

**(continued)**

	<b>Page</b>
1. Alonso Has Forfeited the Argument that Martinez Was Motivated by an Anti-Mexican Bias .....	23
2. Even If Alonso Had Preserved His National Origin Discrimination Theory, Martinez's Comments Are "Stray Remarks" Insufficient to Support an Inference of Anti-Mexican Animus.....	25
3. Martinez's Comments Provide No Evidence of Anti-Veteran Bias or Anti-Disability Bias .....	30
C. Alonso Cannot Establish a Prima Facie Case of Discrimination via the <i>McDonnell Douglas</i> Framework Because He Has Not Identified a Similarly Situated Coworker Who Received More Favorable Treatment .....	34
II. ALONSO'S HOSTILE WORK ENVIRONMENT CLAIM FAILS .....	36
A. There Is No Evidence that Office Pranks Were Motivated by Alonso's Protected Status .....	36
B. Offensive Comments by Alonso's Coworkers Did Not Affect the Terms and Conditions of His Employment.....	38
C. None of the Alleged Harassment Is Imputable to Qwest .....	40
III. ALONSO'S RETALIATION CLAIM FAILS .....	43
A. Alonso Did Not Engage in Statutorily Protected Activity .....	43
B. Qwest Did Not Take any Adverse Employment Action Against Alonso .....	46
C. Alonso's Evidence of Causation Is Insufficient.....	47
CONCLUSION .....	49

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>WASHINGTON CASES</b>	
<i>Adams v. Able Bldg. Supply, Inc.</i> , 114 Wn. App. 291 (2002).....	22
<i>Anica v. Wal-Mart Stores, Inc.</i> , 120 Wn. App. 481 (2004).....	47, 48
<i>Antonius v. King Cnty.</i> , 153 Wn.2d 256 (2004).....	36
<i>Campbell v. State</i> , 129 Wn. App. 10 (2005).....	15, 16, 46
<i>Crownover v. State ex rel. Dep't of Transp.</i> , 165 Wn. App. 131 (2011).....	38
<i>Davis v. Fred's Appliance, Inc.</i> , __ Wn. App. __, 287 P.3d 51 (2012).....	39, 40
<i>Domingo v. Boeing Employees' Credit Union</i> , 124 Wn. App. 71 (2004).....	28, 29
<i>Donahue v. Cent. Wash. Univ.</i> , 140 Wn. App. 17 (2007).....	17
<i>Dumont v. City of Seattle</i> , 148 Wn. App. 850 (2009).....	23
<i>Elcon Const., Inc. v. E. Wash. Univ.</i> , 174 Wn.2d 157 (2012).....	13, 35
<i>Erdman v. Chapel Hill Presbyterian Church</i> , 286 P.3d 357 (Wash. 2012) .....	13
<i>Francom v. Costco Wholesale Corp.</i> , 98 Wn. App. 845 (2000).....	41

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Frisino v. Seattle Sch. Dist. No. 1</i> , 160 Wn. App. 765 (2011).....	31, 35
<i>Glasgow v. Ga.-Pac. Corp.</i> , 103 Wn.2d 401 (1985).....	36, 37, 39, 41
<i>Graves v. Dep't of Game</i> , 76 Wn. App. 705 (1994).....	44
<i>Griffith v. Schnitzer Steel Indus., Inc.</i> , 128 Wn. App. 438 (2005).....	28, 32
<i>Harrell v. Wash. State ex rel. Dep't of Soc. Health Servs.</i> , 170 Wn. App. 386 (2012).....	16
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340 (2007).....	15
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172 (2001), <i>overruled on other grounds by</i> <i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214 (2006).....	14
<i>Johnson v. Dep't of Soc. &amp; Health Services</i> , 80 Wn. App. 212 (1996).....	34
<i>Kastanis v. Educ. Employees Credit Union</i> , 122 Wn.2d 483 (1993), <i>as modified</i> , 865 P.2d 507 (Wash. 1994).....	14, 15, 23
<i>Kirby v. City of Tacoma</i> , 124 Wn. App. 454 (2004).....	passim
<i>Loeffelholz v. Univ. of Wash.</i> , 175 Wn.2d 264 (2012).....	36
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97 (1996).....	13

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Milligan v. Thompson</i> , 110 Wn. App. 628 (2002).....	15
<i>Renz v. Spokane Eye Clinic, P.S.</i> , 114 Wn. App. 611 (2002).....	43
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35 (2002).....	21
<i>Sangster v. Albertson's Inc.</i> , 99 Wn. App. 156 (2000).....	37
<i>Short v. Battle Ground Sch. Dist.</i> , 169 Wn. App. 188 (2012).....	43
<i>Tyner v. State</i> , 137 Wn. App. 545 (2007).....	16, 17, 48
<i>Vasquez v. State, Dep't of Soc. &amp; Health Servs.</i> , 94 Wn. App. 976 (1999).....	45
<i>Washington v. Boeing Co.</i> , 105 Wn. App. 1 (2000).....	39, 40
<b>WASHINGTON CASES</b>	
<i>Alfano v. Costello</i> , 294 F.3d 365 (2d Cir. 2002) .....	38, 40
<i>Anderson v. Douglas &amp; Lomason Co.</i> , 26 F.3d 1277 (5th Cir. 1994).....	26
<i>Annett v. Univ. of Kan.</i> , 371 F.3d 1233 (10th Cir. 2004).....	48
<i>Baloch v. Kempthorne</i> , 550 F.3d 1191 (D.C. Cir. 2008).....	38

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Barry v. Moran</i> , 661 F.3d 696 (1st Cir. 2011).....	28
<i>Beyer v. Cnty. of Nassau</i> , 524 F.3d 160 (2d Cir. 2008) .....	15
<i>Brooks v. Clinton</i> , 841 F. Supp. 2d 287 (D.D.C. 2012).....	19
<i>Buckley v. Hosp. Corp. of Am., Inc.</i> , 758 F.2d 1525 (11th Cir. 1985).....	23
<i>Burlington N. &amp; Santa Fe Ry. Co. v. White</i> , 548 U.S. 53 (2006) .....	passim
<i>Coghlan v. Am. Seafoods Co.</i> , 413 F.3d 1090 (9th Cir. 2005).....	23, 31, 32
<i>Coles v. Deltaville Boatyard, LLC</i> , No. 3:10CV491-DWD, 2011 WL 4804871 (E.D. Va. Oct. 11, 2011).....	21
<i>Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.</i> , 450 F.3d 130 (3d Cir. 2006) .....	44
<i>Daniel v. Boeing Co.</i> , 764 F. Supp. 2d 1233 (W.D. Wash. 2011) .....	17
<i>Delli Santi v. CNA Ins. Cos.</i> , 88 F.3d 192 (3d Cir. 1996) .....	48
<i>Doe v. Dekalb Cnty. Sch. Dist.</i> , 145 F.3d 1441 (11th Cir. 1998) .....	17
<i>Dungee v. Ne. Foods, Inc.</i> , 940 F. Supp. 682 (D.N.J. 1996).....	26
<i>EEOC v. Crown Zellerbach</i> , 720 F.2d 1008 (9th Cir. 1983).....	44

**TABLE OF AUTHORITIES**

(continued)

	<b>Page</b>
<i>Elrod v. Sears, Roebuck &amp; Co.</i> , 939 F.2d 1466 (11th Cir. 1991) .....	26, 31
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775 (1998) .....	22, 37, 40
<i>Foster v. Dalton</i> , 71 F.3d 52 (1st Cir. 1995).....	46
<i>Galabya v. N.Y. City Bd. of Educ.</i> , 202 F.3d 636 (2d Cir. 2000) .....	18
<i>Godwin v. Hunt Wesson, Inc.</i> , 150 F.3d 1217 (9th Cir. 1998).....	23, 31
<i>Gross v. FBL Fin. Servs., Inc.</i> , 557 U.S. 167 (2009) .....	15
<i>Hagan v. Echostar Satellite, L.L.C.</i> , 529 F.3d 617 (5th Cir. 2008).....	44
<i>Harris v. Forklift Sys., Inc.</i> , 510 U.S. 17 (1993) .....	39
<i>Henry v. Wyeth Pharma., Inc.</i> , 616 F.3d 134 (2d Cir. 2010) .....	30
<i>Herrnreiter v. Chicago Housing Auth.</i> , 315 F.3d 742 (7th Cir. 2002).....	19
<i>Hunt v. City of Markham, Ill.</i> , 219 F.3d 649 (7th Cir. 2000).....	15
<i>James v. Booz-Allen &amp; Hamilton, Inc.</i> , 368 F.3d 371 (4th Cir. 2004).....	15
<i>Jurado v. Eleven-Fifty Corp.</i> , 813 F.2d 1406 (9th Cir. 1987).....	44

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Kasten v. St.-Gobain Performance Plastics Corp.</i> , 131 S. Ct. 1325, 1334 (2011).....	43
<i>Kasten v. St.-Gobain Performance Plastics Corp.</i> , __ F.3d __, 2012 WL 5971209 (7th Cir. Nov. 30, 2012), <i>on</i> <i>remand from</i> 131 S. Ct. 325 (2011).....	48
<i>Kocsis v. Multi-Care Mgmt., Inc.</i> , 97 F.3d 876 (6th Cir. 1996) .....	18
<i>Lewis v. City of Chicago</i> , 496 F.3d 645 (7th Cir. 2007) .....	20
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973) .....	13, 15, 34, 35
<i>Meiners v. Univ. of Kan.</i> , 359 F.3d 1222 (10th Cir. 2004) .....	15
<i>Merrick v. Farmers Ins. Group</i> , 892 F.2d 1434 (9th Cir. 1990) .....	28
<i>Moran v. Selig</i> , 447 F.3d 748 (9th Cir. 2006) .....	35
<i>Naficy v. Ill. Dep't of Human Servs.</i> , 697 F.3d 504 (7th Cir. 2012) .....	30
<i>Nesbit v. Pepsico, Inc.</i> , 994 F.2d 703 (9th Cir. 1993) .....	28
<i>Nidds v. Schindler Elevator</i> , 113 F.3d 912 (9th Cir. 1997) .....	17, 32
<i>O'Neal v. City of Chicago</i> , 392 F.3d 909 (7th Cir. 2004) .....	18, 19
<i>Oncale v. Sundowner Offshore Servs., Inc.</i> , 523 U.S. 75 (1998) .....	25, 26

**TABLE OF AUTHORITIES**

(continued)

	Page
<i>Place v. Abbott Labs.</i> , 215 F.3d 803 (7th Cir. 2000).....	17
<i>Pool v. VanRheen</i> , 297 F.3d 899 (9th Cir. 2002).....	44
<i>Pottenger v. Pottlatch Corp.</i> , 329 F.3d 740 (9th Cir. 2003).....	28
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989) .....	20, 28
<i>Rajbahadoorsingh v. Chase Manhattan Bank, NA</i> , 168 F. Supp. 2d 496 (D.V.I. 2001).....	26
<i>Ramirez v. Olympic Health Mgmt. Sys., Inc.</i> , 610 F. Supp. 2d 1266 (E.D. Wash. 2009).....	20
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133 (2000) .....	26
<i>Rhodes v. Guiberson Oil Tools</i> , 75 F.3d 989 (5th Cir. 1996).....	26
<i>Rose v. Wells Fargo &amp; Co.</i> , 902 F.2d 1417 (9th Cir. 1990).....	35
<i>Ross v. Douglas Cnty., Neb.</i> , 234 F.3d 391 (8th Cir. 2000).....	25
<i>Rubinstein v. Adm'rs of Tulane Educ. Fund</i> , 218 F.3d 392 (5th Cir. 2000).....	28
<i>Sanchez v. Denver Pub. Sch.</i> , 164 F.3d 527 (10th Cir. 1998).....	17
<i>Sawyer v. Trane U.S. Inc.</i> , No. 07-2032, 2008 WL 748375 (W.D. Ark. Mar. 17, 2008).....	33

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Shelley v. Bank of Am., N.A.</i> , No. CV-10-5124 RMP, 2011 WL 5835126 (E.D. Wash. Nov. 21, 2011).....	44
<i>Smart v. Ball State Univ.</i> , 89 F.3d 437 (7th Cir. 1996).....	22
<i>Smith v. Equitrac Corp.</i> , 88 F. Supp. 2d 727 (S.D. Tex. 2000).....	26
<i>Smith v. Firestone Tire &amp; Rubber Co.</i> , 875 F.2d 1325 (7th Cir. 1989).....	28, 30
<i>St. Mary's Honor Ctr. v. Hicks</i> , 509 U.S. 502 (1993).....	26, 32
<i>Staub v. Proctor Hosp.</i> , 131 S. Ct. 1186 (2011).....	15
<i>Taylor v. Solis</i> , 571 F.3d 1313 (D.C. Cir. 2009).....	20
<i>Troupe v. May Dep't Stores Co.</i> , 20 F.3d 734 (7th Cir. 1994).....	23, 32
<i>Vasquez v. Cnty. of L.A.</i> , 349 F.3d 634 (9th Cir. 2003).....	34
<i>Welch v. Delta Air Lines, Inc.</i> , 978 F. Supp. 1133 (N.D. Ga.1997).....	26
<i>Williams v. R.H. Donnelley, Corp.</i> , 368 F.3d 123 (2d Cir. 2004).....	17, 18
<i>Willis v. Wal-Mart Stores, Inc.</i> , No. C 06-648P, 2007 WL 1724327 (W.D. Wash. June 14, 2007).....	20, 22

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<b>STATUTES</b>	
42 U.S.C. § 2000e-2(m).....	20
RCW 49.60.180.....	15, 22
RCW 49.60.210.....	2
<b>RULES</b>	
CR 56(c).....	13
RAP 2.5(a).....	23
RAP 9.12.....	23
<b>OTHER AUTHORITIES</b>	
B. Lindemann & D. Kadue, <i>Sexual Harassment in Employment</i> <i>Law</i> 175 (1992).....	37

## INTRODUCTION

Plaintiff Joseph Alonso, a union employee in good standing, accuses his current employer Qwest Corporation<sup>1</sup> ("Qwest") of discrimination, harassment, and retaliation, in violation of the Washington Law Against Discrimination ("WLAD"). A military veteran of Mexican heritage, Alonso primarily complains of mistreatment by his supervisor Ben Martinez, who is, like Alonso, an Army veteran and Mexican American.<sup>2</sup>

The trial court correctly dismissed this suit on summary judgment. Although Alonso clashes with his co-workers, his boss and his union representative, the undisputed evidence shows that he has suffered no actionable legal injury. His wages have continued to rise in accordance with his union's collective bargaining agreement. He admits he has not been denied overtime. He has not sought or been denied promotional opportunities. And despite his repeated insubordination and disrespect towards his managers, he has not been disciplined. Alonso's failure to identify an adverse employment action is fatal to his claims.

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<sup>1</sup> Plaintiff has incorrectly identified Qwest Communications Company, LLC as his employer. Instead, he is employed by Qwest Corporation.

<sup>2</sup> Although identified as a defendant in the Complaint, Martinez has never been served and is not a party to this lawsuit.

In the absence of a cognizable injury, this case is about a disgruntled employee in search of a legal remedy for his discontent. Alonso has no shortage of theories for his workplace frictions, but each is without basis in law and fact: Alonso is not the victim of disability discrimination. He claims he has been harassed because he has a speech impairment, but he admits that the speech impediment he asserts as the basis for his disability claim was a childhood issue that was fixed with oral surgery while he was still a teenager. Alonso also claims he has been harassed because he is a veteran, but most everyone he works with, including his two supervisors, are Army veterans just like him. In the trial court, Alonso claimed that he was discriminated against on the basis of his Christian beliefs. He has abandoned this argument on appeal, but in its place he now tries to resurrect a claim he abandoned at the trial court: discrimination based on his Mexican-American heritage. That claim is not only forfeited, it is meritless. His only evidence of anti-Mexican bias is two out-of-context stray remarks made by other employees *who are also Mexican-American*. Finally, Alonso claims that he was retaliated against in violation of RCW 49.60.210, but he never engaged in protected opposition activity: his internal complaints reflect petty workplace grousing, not allegations of discrimination.

Alonso's grievances have no place in court. The Washington judiciary is not a super-personnel board and it does not sit to resolve workplace personality conflicts. The trial court correctly determined that Alonso's claims are legally meritless and Qwest respectfully asks that summary judgment be affirmed.

### **STATEMENT OF THE CASE**

#### **A. Alonso and His Employment with Qwest**

Joseph Alonso joined Qwest as a Central Office Equipment Installation Technician in May 1999. CP 55. Today and throughout his Qwest employment Alonso has been a union employee represented by the Communications Workers of America. *Id.*, CP 131.

At Qwest, Alonso installs and maintains Qwest's network infrastructure. CP 47. Among Alonso's crew, there are two different work assignments. Most of the crew work installing equipment at Qwest's various "central offices." *Id.* However, one or two technicians are usually assigned to work at customer locations doing what is known as "AQCB" work. *Id.* Among the crew, central office is the preferred assignment, primarily because it provides more opportunities for overtime pay. *Id.* For a two-year period from 2008 until June 2010, Alonso was assigned to work AQCB. *Id.* Unlike the rest of the crew, Alonso liked AQCB: "I

was happy in AQCB. So I mean it wasn't much money, but at least I was alone." CP 102.

**B. Alonso's Diverse Work Crew**

Alonso's work crew consists mostly of Army veterans like himself. CP 50, 96-97. And like the U.S. Army, Alonso's crew reflects the cultural diversity of the nation at large. Alonso's supervisor Ben Martinez, for example, is a Mexican-American Army veteran like Alonso. CP 50. Martinez's supervisor, Stephanie Rybicki retired as a Sergeant First Class from Bravo Company of the Army's 29th Signal Division and is in a committed relationship with a same sex partner. CP 57, 66. Jose Zuniga, against whom Alonso levels many of his complaints, is also Mexican American and an Army veteran. CP 62.

With so many veterans, the workplace has a military "vibe," including the occasional salty language and practical jokes. CP 50, 57. Alonso has complained several times about his co-workers' use of vulgar language in the workplace. CP 49, 57. In response, Martinez has more than once told the crew to tone it down. CP 49-50, 57, 126-27.

Alonso is Mexican American and a military veteran. CP 107. From 1986 to 1998, Alonso served in the United States Army as a telecommunications specialist. CP 136. In his brief, Alonso claims he is a "combat veteran," from the First Gulf War, Appellant's Br. at 6, but the

record evidence is otherwise. CP 97 ("we were communications"); CP 136 (stating on résumé that Alonso was a "Telecommunication, Voice/Data System Specialist").<sup>3</sup> Alonso is classified with a 40 percent disability by the Veteran's Administration, 30 percent of which is attributed to post-traumatic stress disorder and 10 percent of which is attributed to a back injury. CP 95-96. There is no evidence in the record that anyone pertinent to Alonso's claims knew about his PTSD diagnosis. *See* CP 166, 175. Although Martinez did know that Alonso claimed a service-related disability, he thought it was due to a back injury. CP 165-66. Despite his rated disability, Alonso is not limited in any way at work and is able to meet the 100-pound lifting requirements of his job. *Id.*

**C. Alonso Is Reassigned to Central Office Work After Martinez Becomes Concerned with Excessive Overtime**

In April 2010, work was slowing down and Rybicki told Martinez to restrict overtime unless absolutely necessary. CP 47, 57-58. Martinez then approached all his crew members and told them that his prior authorization was required before they could work overtime. *Id.*; CP 101.

Martinez also had the specific concern that Alonso was reporting a lot of overtime. During the first four months of 2010, Alonso reported 120 hours of overtime. CP 48. This was the fourth highest total among

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<sup>3</sup> Alonso was not an Airborne Ranger and he did not hurt his back jumping out of an airplane, *see* CP 165, notwithstanding what he asserts in his brief and boasted to his fellow crew members, *see* Appellant's Br. at 4, CP 51, 233.

the 15-person crew and only seven hours fewer than the highest reported overtime. *Id.* At the time Alonso was assigned to AQCB, which typically requires little or no overtime. *Id.* This is because the AQCB technician normally cannot start work until the customers are available after 9:00 a.m. Yet Alonso was reporting to work as early as 4:00 or 5:00 a.m. and he was reporting 12 to 13 hours of work per day. CP 48, 104. In addition, Martinez reviewed the quantity of work Alonso was generating and it was not consistent with 30 overtime hours per month. CP 48. For these reasons, Martinez became concerned about how Alonso, who was essentially unsupervised in the AQCB assignment, was charging his time. *Id.*

Despite Martinez's instructions, Alonso continued to charge overtime without pre-approval. *Id.* Around the same time, the local union complained to Martinez that Qwest was not rotating the AQCB job among the crew. CP 48. Rotating AQCB enabled everyone to be trained on the available union assignments. CP 48, 58.

Accordingly, in late April or early May 2010, Martinez decided to move Alonso back to the central office and rotate Brad Tuttle to the ACQB. CP 48. It is undisputed that in the central office, Alonso has greater opportunities for approved overtime. CP 48, 57, 113. Because the AQCB post requires interfacing with customers, the AQCB technician is

typically assigned a newer van and a cell phone. CP 47. Accordingly, these were given to Brad Tuttle after the shift switch. CP 48.

**D. Martinez Calls a Crew Meeting**

During the same period that Rybicki admonished team supervisors to crack down on excessive overtime, she also grew concerned that shift scheduling on some crews, including Martinez's, was inconsistent with the collective bargaining agreement, which prompted complaints from the union. CP 49, 58. Rybicki told Martinez to go back to a formal "post and bid" process for assigning shifts. *Id.*

Based on these and other concerns, Rybicki instructed Martinez to call a meeting with his crew to address four issues: cutting back on overtime, cross-training on AQCB, shift selection, and profanity in the workplace. CP 49, 58. Martinez held the meeting on May 20, 2010, and covered all four areas. CP 49-50. He announced to the crew that Alonso would be returning to central office work and that Brad Tuttle would be moving to AQCB. *Id.*

**E. Alonso Makes a Series of Internal Complaints to Rybicki, the Union, and the Qwest Employee Hotline**

Martinez's instructions to cut back on overtime triggered a series of complaints from Alonso.<sup>4</sup> First, he approached Stephanie Rybicki and

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<sup>4</sup> Alonso leads off his brief with a series of comments allegedly made by Ben Martinez and then insinuates that these comments are what triggered Alonso's calls to the

complained about what he characterized as Martinez's incompetence and inefficiency.

The complaint was—pretty much that he was putting a lot of pressure on me on things that he's supposed to be taking care of like records and status and all that stuff and then at the last minute he would react. He wouldn't . . . set schedules for things. He would just react. Oh, because somebody called about this job so he would call the people. Go do this job. So they would have to leave what they were doing and react to whatever and like I said, it was terrible.

CP 98-99. Alonso also told Stephanie Rybicki that it didn't "make sense" that he had to carry the load for Martinez's inefficiency. CP 99.

Unsatisfied with Rybicki's response (she defended Martinez), Alonso complained to his union that Martinez was trying to cut back his overtime. *See* CP 100-01, 103. Again, however, Alonso was unhappy with the union's response. CP 103.

On April 30, 2010, at 7:34 p.m. EDT, Alonso made the first of several calls to Qwest's employee hotline, all of which were contemporaneously documented. In this first call, Alonso complained that Martinez allowed "vulgar conversation of a sexual nature and profanity in the workplace." CP 81. Alonso complained that Martinez gave preferential treatment to employees who laughed at the behavior and that

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Qwest hotline. Appellant's Br. at 1. In fact, Alonso never mentioned any of these supposed comments in his internal complaints to Qwest.

he denied overtime to those who took offense. *Id.* Alonso also complained that his union representative and co-worker Laurie Gonce "is rude and makes false accusations against employees." *Id.* He complained that Gonce did not address union issues "in exchange for Ben [Martinez] not addressing her behavior." *Id.* Qwest's detailed record of the call includes no accusations of discrimination of any kind. *Id.*

On May 6, 2010, at 6:23 a.m., Alonso called the hotline again and specifically complained that Martinez had taken away his overtime and was giving overtime to his favored employees. CP 82. Again, there is no mention of discrimination in Qwest's log.<sup>5</sup> Just a few days before, Martinez had spoken with Alonso about cutting back on the overtime. CP 48, 101.

On May 12, 2010, at 9:05 p.m., Alonso called the hotline and reported that Martinez was questioning Alonso's work and performance and was looking for a reason to terminate him. CP 79. Again, there is no allegation of discrimination.

On May 19, at 7:54 p.m., Alonso again called the hotline. He complained that Brad Tuttle and Joe Zuniga had put hand sanitizer on a telephone Alonso used. CP 78, 128. Alonso describes the telephone as

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<sup>5</sup> When asked at his deposition who the favored employees were, Alonso identified Jose Zuniga, who is Mexican American, Dave Thomas, who is part African American, and Brad Tuttle, who is white. CP 108. All are Army veterans. CP 50.

"his" telephone and the desk as "his" desk. This referred to a desk and phone that the entire crew shared. CP 51, 128-29. Alonso told the hotline that he suspected that Zuniga and Tuttle had done this because of Alonso's prior reports to the hotline about Martinez. CP 78.

On May 20, at 8:43 p.m., Alonso called the hotline a fifth time. This time he told the hotline that he had complained to Rybicki, who told him she would speak with Martinez. Alonso stated that Rybicki had told Martinez about Alonso's complaint to her. CP 77. Alonso also reported to the hotline that during the May 20 crew meeting, Martinez had changed everyone's shifts and that Martinez had told the crew that "somebody here messed it up for everybody" and that "[s]omebody is calling in." *Id.* Again, Alonso did not allege that he was being discriminated against on the basis of race, national origin, veteran status, disability, or any other protected characteristic.

On May 25, at 4:11 p.m., Alonso placed a sixth hotline call and complained that Rybicki had laughed when Alonso told her that Zuniga and Tuttle had put grease on "his" desk. CP 86. He also reported that Martinez had reprimanded Alonso for not adhering to his schedule. *Id.* He said that Rybicki made "excuses" for Martinez and when Alonso complained about the vulgar language Rybicki responded that that was not

her responsibility. *Id.* As with all the other calls, Alonso's final complaint said nothing about discrimination.

**F. Alonso Is Insubordinate and Disrespectful Towards Martinez and His Co-Workers**

Although Alonso complains about his co-workers' vulgarity and offensive behavior, he has engaged in the same types of unprofessional conduct. For example, Alonso complains that Ben Martinez treats him disrespectfully, but Alonso's own testimony shows that was openly rude to and disdainful of Martinez. On one occasion, Martinez reprimanded Alonso because Alonso did not have enough routers to cover his jobs. Alonso then emailed Rybicki and tried to blame the shortage on Martinez. When Martinez confronted Alonso for lying to Rybicki, Alonso responded in a completely disrespectful way. Alonso explained the exchange in his deposition:

Mr. Martinez called me, you know, he start chewing me out and you say that the routers—that I took the routers and this and that. I said, Look, Ben, you know, every time something happens you're chewing me up. *I cover for you and I am really getting tired of this thing. So why don't you just man up and take control of this thing?*

CP 105-106 (emphasis added).

Similarly, while Alonso complains that his coworkers harassed him with offensive remarks, he has also engaged in name-calling and made inappropriate comments. For example, Alonso called his former co-

worker Dave Thomas, who is part African American, "Decker." He explains that this is what he calls African Americans, in an apparent reference to the brand, Black & Decker. CP 108-110. He mocked his co-worker Brad Tuttle with the nickname, "Tiny," because Tuttle is slightly built. CP 66, 110-111. He joked that Tuttle was so poor he rents his work shoes and he made sexually explicit comments about Tuttle's wife. CP 66. Alonso called co-worker and union representative Laurie Gonce a "sellout" who "doesn't like to work" and accused her, without any evidence, of cutting a side deal with Martinez to betray her union members. CP 100, 132, 134.

**G. Procedural History**

On June 7, 2011, Alonso filed suit against Qwest and Martinez in Pierce County Superior Court. CP 1. The complaint alleged disparate treatment, harassment, and retaliation in violation of the WLAD, as well as the common-law torts of negligent supervision, negligent retention, and negligent infliction of emotional distress. CP 6-7. Qwest answered and filed a motion for summary judgment on all claims. On June 19, 2012, the trial court granted summary judgment to Qwest in full. Alonso timely appealed the dismissal of his WLAD claims to this Court.

## ARGUMENT

### **Standard of Review**

Summary judgment is appropriate where the record reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Erdman v. Chapel Hill Presby. Church*, 286 P.3d 357, 363 (Wash. 2012), citing CR 56(c). A court of appeals reviews the trial court's decision to grant summary judgment *de novo* and considers all of the admissible evidence in the light reasonably most favorable to the nonmoving party, which in this case is Alonso. *See id.* For "a plaintiff alleging discrimination in the workplace to overcome a motion for summary judgment, the worker must do more than express an opinion." *Marquis v. City of Spokane*, 130 Wn.2d 97, 105 (1996). The employee "must establish specific and material facts to support each element of his or her" claim. *Id.* "Conclusory statements and speculation will not preclude a grant of summary judgment." *Elcon Const., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169 (2012).

#### **I. Alonso Has No Viable Claim for Disparate Treatment**

To withstand summary judgment on a disparate treatment claim, a plaintiff may proceed under either (or both) of two "alternative" methods of proof—the "direct evidence method," and the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

*See Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 491-92 (1993), *as modified*, 865 P.2d 507 (Wash. 1994). Alonso relies on both methods, but he has not established the necessary elements of either approach: He cannot identify (A) an adverse employment action Qwest took against him, (B) sufficient evidence that his supervisor harbored a discriminatory animus, or (C) any similarly situated coworker outside his protected classes who received more favorable treatment. The trial court correctly granted summary judgment on this claim.

**A. No Adverse Employment Action Occurred**

Alonso's failure to show that Qwest subjected him to an adverse employment action is fatal to his disparate treatment claim. Alonso argues that "some courts" in Washington do not require "employees to show 'an adverse employment action.'" Appellant's Br. at 27. That is incorrect. It is well settled under both Washington and federal law that an adverse employment action is an essential element of a disparate treatment claim. *See, e.g., Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186-87 (2001) (the plaintiff's "*ultimate* burden in cases brought under [the WLAD] is to present evidence sufficient for a trier of fact to reasonably conclude that the alleged unlawfully discriminatory animus was more likely than not a substantial factor in the *adverse employment action*." (second emphasis added), *overruled on other grounds by McClarty v. Totem Elec.*, 157

Wn.2d 214 (2006).<sup>6</sup> This is confirmed by the plain text of the WLAD, which prohibits discrimination in hiring, termination, compensation or "other *terms or conditions of employment*." RCW 49.60.180 (emphasis added). Whether a plaintiff proceeds under the direct method or under *McDonnell Douglas*, an adverse employment action is the necessary predicate of a disparate treatment claim.<sup>7</sup>

In Washington, an actionable "adverse employment action involves 'a change in employment conditions that is more than an inconvenience or alteration of job responsibilities,' such as reducing an employee's workload and pay." *E.g., Campbell v. State*, 129 Wn. App. 10,

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<sup>6</sup> See also *Milligan v. Thompson*, 110 Wn. App. 628, 636 (2002) (to "make out a prima facie case of discrimination," the plaintiff "must show," *inter alia*, that "he was discharged or suffered [an] *adverse employment action*") (emphasis added); *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193 (2011) (employer is liable under Uniformed Services Employment and Reemployment Rights Act "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an *adverse employment action*, and if that act is a proximate cause of the ultimate employment action") (footnote omitted, second emphasis added); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009) ("We hold that a plaintiff bringing a disparate-treatment claim pursuant to the [Age Discrimination in Employment Act] must prove . . . that age was the 'but-for' cause of the challenged *adverse employment action*." (emphasis added); ("a substantive violation of [Title VII] only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an *adverse employment action*") (emphasis added); *Beyer v. Cnty. of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008) (Calabresi, J.) (Title VII "requires [the plaintiff] to show that . . . she suffered an adverse employment action"); *Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1228-29 (10th Cir. 2004) (McConnell, J.) (adverse employment action is an "essential element" of a discrimination claim); *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 379 (4th Cir. 2004) (Wilkinson, J.) ("the language of the statute requires the existence of some adverse employment action to establish a Title VII violation"); *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 653 (7th Cir. 2000) (Posner, C.J.) ("The idea behind requiring proof of an adverse employment action is simply that a statute which forbids *employment* discrimination is not intended to reach every bigoted act or gesture that a worker might encounter in the workplace.").

<sup>7</sup> Compare *Kastanis*, 122 Wn.2d at 491 (direct evidence method), with *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 355 (2007) (*McDonnell Douglas*).

22 (2005) (some internal quotation marks omitted), quoting *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465 (2004). Alonso contends that he suffered three adverse employment actions: (1) he was reassigned from AQCB back to central office work; (2) he received "heightened scrutiny" because Martinez asked him to clean up the "mess" in his work area and frequently phoned to check in on him; and (3) his coworkers played practical jokes he imagined were directed at him. Because these allegations do not reflect material "change[s] in employment conditions," *Campbell*, 129 Wn. App. at 22, they do not qualify as adverse employment actions.

**1. Alonso's Reassignment to Central Office Work Was Not an Adverse Employment Action**

Alonso first argues that his reassignment from AQCB to central office work was an adverse action. It is true that a "demotion or *adverse* transfer . . . may amount to an adverse employment action." *Harrell v. Wash. State ex rel. Dep't of Soc. Health Servs.*, 170 Wn. App. 386, 398 (2012) (emphasis added). But a "reassignment of job duties is not automatically actionable." *Tyner v. State*, 137 Wn. App. 545, 565 (2007), quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71 (2006). Rather, a "particular reassignment" must be "*materially* adverse"

as "judged from the perspective of a reasonable person in the plaintiff's position." *Id.*, quoting *White*, 548 U.S. at 71 (emphasis added).

Alonso's reassignment from AQCB to central office work was not a materially adverse employment action because the two positions are equivalent in all material respects: they share the same duties, the same salary, the same supervisor, the same team, and the same rank. CP 113, 132, 133; *see, e.g., Tyner*, 137 Wn. App. at 564-65 (plaintiff's transfer "did not constitute an adverse employment action" where she "was never subject to any loss in pay or benefits" and "had shorter working hours and the right to request reimbursement for her commute mileage").<sup>8</sup> That Alonso liked AQCB work better is irrelevant. "[S]ubjective, personal disappointments do not meet the objective indicia of an adverse employment action." *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 128 (2d Cir. 2004) (Sotomayor, J.).<sup>9</sup> Alonso's reassignment back to the

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<sup>8</sup> *See also Donahue v. Cent. Wash. Univ.*, 140 Wn. App. 17, 26 (2007) (professor's reassignment to another department was not adverse employment action where he "did not lose tenure, he was not demoted, and he did not receive a reduction in pay"); *Daniel v. Boeing Co.*, 764 F. Supp. 2d 1233, 1245-46 (W.D. Wash. 2011) (applying Washington law and finding no adverse employment action in plaintiff's transfer where she "worked in the same position, for the same pay, with the same job responsibilities" and "the only change was in location").

<sup>9</sup> *See, e.g., Place v. Abbott Labs.*, 215 F.3d 803, 810 (7th Cir. 2000) ("being shifted to an essentially equivalent job that [an employee did] not happen to like as much does not a Title VII claim create"); *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532-33 n.6 (10th Cir. 1998) (plaintiff's subjective preferences are not controlling); *Doe v. Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998) (same); *see also Nidds v. Schindler Elevator*, 113 F.3d 912, 919, 915 (9th Cir. 1997) (transfer to another department was not as an "adverse employment action" even though plaintiff viewed it as

central office entailed no "materially significant disadvantage," *id.*, quoting *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000), and was therefore not an adverse action.<sup>10</sup>

Alonso next complains that after he was reassigned he "lost his office"<sup>11</sup> and Qwest assigned him a "dilapidated" van and took away his company cell phone. Appellant's Br. at 2. But none of these changes amounts to "more than an inconvenience" that routinely accompanies a change in job assignments. *See Kirby*, 124 Wn. App. at 465. They consequently do not meet the materiality threshold that an adverse employment action requires. In *O'Neal v. City of Chicago*, 392 F.3d at 912, for example, the Seventh Circuit held that a reassignment resulting in the loss of the plaintiff's "work-provided cellular telephone, pager, vehicle, and parking space" was not an adverse employment action. "By definition, any lateral job transfer will result in changes to an employee's job responsibilities and work conditions," but that does "not justify

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a "demotion"); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) ("reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims").

<sup>10</sup> Of course, there is one pecuniary difference between the two positions: central office work provides *greater* opportunity for overtime pay than AQC.B. *See* CP 113. Perhaps, then, transferring an employee *from* central office *to* AQC.B might have been an adverse employment action. But Alonso's "idiosyncratic" preference for AQC.B does not magically transform his transfer to the more coveted central office work into an adverse employment action. *See O'Neal v. City of Chicago*, 392 F.3d 909, 912 (7th Cir. 2004).

<sup>11</sup> By "lost his office," Alonso can only mean that he no longer had priority over a shared desk; none of Qwest's Tacoma technicians, including Alonso, ever had their own office. *See* CP 47, 117.

trundling out the heavy artillery of . . . antidiscrimination law." *Id.* at 913, quoting *Herrnreiter v. Chicago Housing Auth.*, 315 F.3d 742, 745 (7th Cir. 2002).<sup>12</sup> Here, too, Alonso's transfer—and the attendant loss of minor perquisites—was not an adverse employment action because it did not effect an objectively material change in working conditions.

## **2. The Purported "Heightened Scrutiny" Alonso Faced Was Not an Adverse Employment Action**

Next, Alonso avers that Martinez subjected him to "heightened scrutiny" by (a) requiring Alonso to receive Martinez's pre-authorization before working overtime, (b) once criticizing Alonso for his "mess," and (c) frequently checking in with Alonso by phone. Initially, there is no evidence that this so-called scrutiny was unique to Alonso beyond Alonso's and one other co-worker's speculative assertions, for which no foundation is offered. CP 139, 159-161, 169.

Regarding overtime, there is no evidence that Alonso was treated less favorably than others. To the contrary, it is undisputed that Alonso worked either the most overtime or close to the most overtime of every member of the crew during all times relevant to his claims. *See* CP 169.

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<sup>12</sup> *See also Brooks v. Clinton*, 841 F. Supp. 2d 287, 301 (D.D.C. 2012) ("The discontinuation of the plaintiff's work-issued cellular telephone also does not constitute an adverse employment action.").

As for Martinez's criticism of Alonso's "mess" and his alleged check-in calls, such workplace commonplaces are not adverse employment actions. *Cf.* 124 Wn. App. at 465 ("yelling at an employee or threatening to fire an employee is not an adverse employment action").<sup>13</sup> The "heightened scrutiny" Alonso decries essentially amounts to a complaint that he has a tough boss. This is not the kind of adverse action that supports a cause of action for employment discrimination. *See White*, 548 U.S. at 69; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 294 (1989) (Kennedy J., dissenting) ("courts do not sit to determine whether litigants are nice"), *superseded on other grounds by* 42 U.S.C. § 2000e-2(m).

### **3. Alonso's Evidence of "Harassment" Does Not Amount to an Adverse Employment Action**

Finally, Alonso says that he suffered an adverse employment action in the form of harassment from his coworkers. This argument merely equates his disparate treatment claim to his hostile work environment claim. Yet even if this Court were to treat workplace harassment as cognizable under a disparate treatment theory, Alonso has

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<sup>13</sup> *See also Taylor v. Solis*, 571 F.3d 1313, 1321 (D.C. Cir. 2009) (supervisor's "criticism [of plaintiff] was not a materially adverse action"); *Ramirez v. Olympic Health Mgmt. Sys., Inc.*, 610 F. Supp. 2d 1266, 1281 (E.D. Wash. 2009) ("Courts should avoid 'trivial personnel actions' brought by 'irritable, chip-on-the-shoulder employees'"), quoting *Lewis v. City of Chicago*, 496 F.3d 645, 654 (7th Cir. 2007); *Willis v. Wal-Mart Stores, Inc.*, No. C 06-648P, 2007 WL 1724327, at \*3 (W.D. Wash. June 14, 2007) (adverse employment action does not "include 'petty slights, minor annoyances, and simple lack of good manners.'"), quoting *White*, 548 U.S. at 68.

not identified any harassment *by Martinez* (the relevant decisionmaker) that arguably meets the material adversity standard. Alonso claims "Martinez made direct, derogatory comments implicating *each* of Alonso's protected characteristics as a motive. This alone amounts to an adverse employment action." Appellant's Br. at 30-31.

There are several problems with this argument. First, Martinez's comments provide no evidence of unlawful motive. *See infra* section I.B. Second, Alonso's assertion equates evidence of discriminatory animus with evidence of an adverse employment action. *Cf. Coles v. Deltaville Boatyard, LLC*, No. 3:10CV491-DWD, 2011 WL 4804871, at \*5 (E.D. Va. Oct. 11, 2011) (chastising litigant for "confus[ing] the element of *causation* (i.e., "retaliatory motive"), with the element of an adverse employment action"). Third, Alonso does not bother to explain how any of Martinez's remarks were materially adverse. The record reflects only one specific reference Martinez made to Alonso that was even arguably derogatory: according to Alonso's declaration, Martinez asked him, "Are you crazy?" CP 233. While potentially discourteous—depending on the context, which Alonso does not provide—neither this comment nor any of Martinez's more general remarks was so "severe and pervasive" as to "affect the terms or conditions" of Alonso's employment. *See Robel v. Roundup Corp.*, 148 Wn.2d 35, 44 (2002). At most, Martinez's comments

are the kind of "petty slights, minor annoyances, and simple lack of good manners" that antidiscrimination laws do not reach. *See Willis*, 2007 WL 1724327, at \*3, quoting *White*, 548 U.S. at 68.

The WLAD is not a "general civility code." *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297 (2002), quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). And "not everything that makes an employee unhappy is an actionable adverse action." *E.g., Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996). The operative question is whether the employer "discriminate[d] against [the plaintiff] . . . in [the] terms or conditions of employment." RCW 49.60.180. Qwest did not. Alonso may have preferred to remain on the AQCB rotation. He may have felt Martinez was too critical of his work. He may have taken offense at some of Martinez's remarks. But none of these complaints amounts to a materially adverse employment action.

**B. There Is Insufficient Evidence of Discriminatory Animus**

Even if Alonso had suffered an adverse employment action, his evidence fails the direct method of proof because it does not support the crucial element of discriminatory motive. To "establish a *prima facie* case of discrimination by direct evidence, a plaintiff must provide direct evidence that the defendant acted with a discriminatory motive and that the discriminatory motivation was a 'significant or substantial factor in an

employment decision." *Kastanis*, 122 Wn.2d at 491 (ellipsis omitted), quoting *Buckley v. Hosp. Corp. of Am., Inc.*, 758 F.2d 1525, 1530 (11th Cir. 1985). The plaintiff may rely on direct or circumstantial evidence that an employment decision was unlawfully motivated. *See Dumont v. City of Seattle*, 148 Wn. App. 850, 867-68 (2009).<sup>14</sup> For the reasons discussed below, Alonso failed to present sufficient evidence to show animus under either approach. In addition, Alonso forfeited his preposterous claim that Martinez discriminated against him because he is Mexican-American by failing to raise it before the trial court.

**1. Alonso Has Forfeited the Argument that Martinez Was Motivated by an Anti-Mexican Bias**

For the first time on appeal, Alonso argues that Martinez acted against him because Alonso was Mexican-American. Alonso has forfeited this argument because he did not present this argument to the trial court. *See* RAP 9.12; RAP 2.5(a); *Kirby*, 124 Wn. App. at 465. Although Alonso makes vague allegations that he was "singled out because of his

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<sup>14</sup> Direct evidence is evidence that, "if believed, proves the fact [of discriminatory animus] without inference or presumption." *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005), quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998). "Circumstantial evidence, in contrast, is evidence that requires an additional inferential step to demonstrate discrimination." *Id.* Under federal law, "the plaintiff need offer 'very little' direct evidence to raise a genuine issue of material fact" as to unlawful motive. *Id.*, quoting *Godwin*, 150 F.3d at 1221. "But when the plaintiff relies on circumstantial evidence, that evidence must be 'specific and substantial' to defeat the employer's motion for summary judgment." *Id.*, quoting *Godwin*, 150 F.3d at 1222. In one formulation, the plaintiff must construct "a convincing mosaic" of circumstantial evidence that would allow a reasonable juror to infer intentional discrimination. *E.g.*, *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994).

Mexican heritage," CP 205, at summary judgment he provided no evidence and no argument in support of that theory. In his Response Memorandum to Qwest's Motion for Summary Judgment ("Response"), Alonso argued that Martinez discriminated against Alonso because he was a disabled veteran with a speech impediment.<sup>15</sup> But he never alleged that Martinez was motivated by anti-Mexican animus.

At his deposition, Alonso was asked about Martinez's reasons for disliking him. Alonso listed every imaginable characteristic *except* his Mexican ancestry:

Like I said, there's a bunch of things. There's my military status. I am the only war veteran. Most of them were kicked out of the service on dishonorable discharge. And my beliefs, you know, I'm a Christian. They use vulgar language. I don't.

CP 117. Asked again if there was "any other reason you can think of," Alonso replied, "My disabilities from the service," "my Christian beliefs," and "my military status." CP 118. He never said he thought Martinez had treated him badly because he is Mexican-American. Because Alonso did not raise his national origin-based disparate treatment claim to the trial court, he has failed to preserve this claim for appeal.

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<sup>15</sup> CP 206, 228 (asserting that Martinez disliked disabled veterans and acted out of retaliation). Likewise, in his declaration Alonso makes no mention of any anti-Mexican bias of Martinez's, or of any comment indicating such bias. See CP 231-39.

**2. Even If Alonso Had Preserved His National Origin Discrimination Theory, Martinez's Comments Are "Stray Remarks" Insufficient to Support an Inference of Anti-Mexican Animus**

Even if the Court were to forgive the forfeiture, the record does not reasonably support an inference that Martinez discriminated against Alonso because of his Mexican heritage.

First, the inference of anti-Mexican bias here is implausible because Martinez is *himself* Mexican-American. To be sure, same-group disparate treatment claims are not categorically outside the scope of antidiscrimination law. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (rejecting "categorical rule excluding same-sex harassment claims from the coverage of Title VII"); *Ross v. Douglas Cnty., Neb.*, 234 F.3d 391, 396 (8th Cir. 2000) (affirming judgment for plaintiff in race-harassment case in which both harasser and victim were African American). Contrary to Alonso's straw-man assertion, Qwest does not contend that "a member of a protected class can never discriminate based on the same protected characteristic." Appellant's Br. at 32.

But it is "[c]ommon sense," *Oncale*, 523 U.S. at 82, that when a decisionmaker belongs to the same protected group as the plaintiff, it is less probable (though of course still *possible*) that the alleged

discriminator acted against the plaintiff out of animus for their shared characteristic. As many courts have recognized, the inference of animus is less "easy to draw" in a same-group discrimination case than in a traditional inter-group scenario. *Cf. id.* at 80.<sup>16</sup> Accordingly, more rigorous evidence is required to prove same-group discrimination. *See, e.g., Oncale*, 523 U.S. at 80 (noting that "plaintiff alleging same-sex harassment" could show that such harassment was discriminatory if "there were credible evidence that the harasser was homosexual").

In this case, Alonso's evidence is far too weak to show Martinez harbored a self-loathing, anti-Mexican animus. Alonso says he has "direct

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<sup>16</sup> *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513-14 (1993) (inference of race discrimination is undermined where hiring officer is in "the same minority group as the plaintiff"); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1002 (5th Cir. 1996) (en banc) (DeMoss, J., concurring in part and dissenting in part) ("proof that all of the decision makers were members of the same race as the complaining employee would considerably undermine the probability that race was a factor in the employment decision"), *abrogated on other grounds by Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1292 (5th Cir. 1994) (affirming summary judgment to employer in part on ground that some decisionmakers were of the same race as the plaintiffs); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991) (stating that plaintiff faces a "difficult burden" to prove animus where the alleged discriminators are within the same protected class as he); *Smith v. Equitrac Corp.*, 88 F. Supp. 2d 727, 742 (S.D. Tex. 2000) ("if the decision maker and the plaintiff are the same race, that fact tends to greatly undermine the inference of racial discrimination"); *Rajbahadoorsingh v. Chase Manhattan Bank, NA*, 168 F. Supp. 2d 496, 502 (D.V.I. 2001) ("Pancham is of the same race as Rajbahadoorsingh. Thus, it is hard to fathom how Pancham's statements could be construed to show that Rajbahadoorsingh's termination was racially motivated.") (footnote omitted); *Welch v. Delta Air Lines, Inc.*, 978 F. Supp. 1133, 1153 (N.D. Ga. 1997) ("it is extremely difficult for a plaintiff to establish discrimination where the allegedly discriminatory decision-makers are within the same protected class as the plaintiff"); *Dungee v. Ne. Foods, Inc.*, 940 F. Supp. 682, 688 n.3 (D.N.J. 1996) ("The fact that the final decision maker and both interviewers are members of the plaintiff's protected class (women) weakens any possible inference of discrimination.").

'smoking gun' evidence," alleging that Martinez "referred to Alonso using derogatory terms like 'spic' and 'ghetto Hispanic.'" Appellant's Br. at 35. This distorts the record. No evidence indicates that anyone called Alonso a "spic" or any other ethnic slur. The only reference to the word "spic" is found in Alonso's deposition testimony that Zuniga referred to migrant workers as "spics," to which Martinez supposedly replied, "Yeah, Spics." CP 115-16; *see also* CP 116 ("Q. So that's all he said was, Yeah, Spics? A. Uh-huh. Q. Yes? A. Yes."). There is no evidence that Martinez—or anyone else at Qwest—ever "referred to *Alonso* [as a] . . . 'spic.'" Appellant's Br. at 35 (emphasis added).<sup>17</sup>

Finally, even if Martinez were not himself Mexican-American, none of his alleged remarks would support an inference of anti-Mexican bias, let alone constitute "direct 'smoking gun' evidence" of such animus. The "Yeah, spics" and "ghetto Hispanic" comments are so vague and decontextualized that they are of negligible evidentiary value. They are quintessential "stray remarks"—that is, "a statement that, while on its face

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<sup>17</sup> Nor is there any evidence that Martinez called Alonso a "ghetto Hispanic," as Alonso repeatedly alleges in his brief. *See, e.g.*, Appellant's Br. at 1, 23, 35. At his deposition, Alonso claimed only that Martinez "said that I speak like in the ghetto." CP 124; *see also* CP 125 ("Mr. Martinez think he's a gangster for some reason. He does the walk, the pimp walk, and he said like, You don't know how ghetto I can get. I said, What do you mean? He said, C'mon, you talk like you are from the ghetto. And I said, I don't know what you're talking about. Oh, c'mon, look at your accent or whatever."). It is true that Alonso's co-worker Margaret Bueschel stated in her declaration that she "heard the statement that Joseph talked like a 'ghetto Hispanic,'" CP 144, but she did not identify the declarant. .

appears to suggest bias, is not temporally or causally connected to the challenged employment decision and thus not probative of discriminatory animus." *Barry v. Moran*, 661 F.3d 696, 707 (1st Cir. 2011).

In Washington, stray remarks are insufficient to establish a triable issue of fact as to discriminatory animus.<sup>18</sup> In *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 89 (2004), the age discrimination plaintiff pointed to her supervisor's comment that she was "no longer a spring chicken" as evidence of age bias. The court of appeals affirmed summary judgment to the employer, finding the "spring chicken" comment to be an "isolated, stray remark" that shed little light on whether

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<sup>18</sup> See, e.g., *Kirby*, 124 Wn. App. at 468 n.10 ("Even if [alleged discriminator] had been the decision maker, such stray remarks would not have given rise to an inference of discriminatory intent."), citing *Pottenger v. Pottlatch Corp.*, 329 F.3d 740, 747 (9th Cir. 2003) (decisionmaker's comments referring to an "old management team," an "old business model," and "deadwood," "did not support inference of age discrimination so as to create a triable issue of material fact"), and *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989) (noting that stray "remarks, . . . when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue."); *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 458 (2005) ("If workplace comments do not pertain to an individual's qualifications as an employee, they are 'stray remarks' that have no bearing in a claim for employment discrimination."), citing *Rubinstein v. Adm'rs of Tulane Educ. Fund*, 218 F.3d 392, 400-01 (5th Cir. 2000) (comments that an employee was a "Russian Yankee" and that Jews are thrifty were not probative as to why employee was denied tenure); see also *Hopkins*, 490 U.S. at 277 (O'Connor, J., concurring in the judgment) ("stray remarks in the workplace" do not "suffice to satisfy the plaintiff's burden" to prove a prima facie case); *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993) (decisionmaker's comment that "we don't necessarily like grey hair" was "at best weak circumstantial evidence of discriminatory animus" and therefore insufficient to permit reasonable inference of age discrimination); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) (in age discrimination case, decisionmaker's comment that he promoted a younger worker instead of plaintiff because worker was "a bright, intelligent, knowledgeable young man" did not raise a triable issue of fact because "'stray' remarks are insufficient to establish discrimination").

the supervisor acted for an unlawful reason. *Id.* "Without evidence about the context of the remark, it is impossible to know whether it is related to [the plaintiff]'s termination, whether [the supervisor] innocently made the comment in an unrelated context, or said it as a joke." *Id.* at 90. "Even if the comment were seen as circumstantial evidence of age discrimination, it creates such a weak issue of fact that no rational trier of fact could conclude that [the employer] fired [the plaintiff] because of her age." *Id.*

Here, too, the "Yeah, spics" and "ghetto Hispanic" comments are too devoid of context to create a material issue of fact over whether Martinez harbors an anti-Mexican-American bias. Alonso testified that Martinez said, "Yeah spics" at a meeting, but he did not identify the date, the location, or the subject-matter of the meeting, or any other basic background element to help place the remark in context.<sup>19</sup> As in *Domingo*, "[t]here is no evidence in the record . . . about the context or manner" in which Martinez supposedly made the comment. *See id.* at 90. As for Martinez's alleged "ghetto" remark, Alonso's deposition testimony suggests that at first Martinez described *himself* as "ghetto," saying "You

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<sup>19</sup> Asked to provide more context, Alonso failed to provide a single detail:

Q. Wait, all he says was, Those Spics? I mean was there a context to it? What was the context? How does it come up?

A. Talking about the Mexicans, the people that -- their color, you know. And I said, you know, That could be me there because I'm American heritage and Mexican heritage.

CP 115.

don't know how ghetto I can get." CP 125. When in the same conversation Martinez used "ghetto" to describe the way Alonso talks, it strains credulity to suppose that the word suddenly became not just derogatory but *discriminatory*. Moreover, neither the "spic" nor "ghetto" comment had anything to do with Alonso's employment. Because both remarks were allegedly uttered in casual conversations, remote from any decisional process relating to Alonso's job, they do not prove discriminatory animus.<sup>20</sup>

In sum, considering these stray remarks in the totality of the circumstances—including that Martinez is himself Mexican-American and that Alonso never raised any of this in his many internal complaints at work—they are insufficient to show anti-Mexican bias.

### **3. Martinez's Comments Provide No Evidence of Anti-Veteran Bias or Anti-Disability Bias**

Alonso has preserved his claims of disparate treatment based on disability and veteran status. They are equally meritless, however. Because Martinez (the alleged discriminator) was also a veteran, Alonso again faces the "difficult burden" of establishing same-group animus with

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<sup>20</sup> See, e.g., *Kirby*, 124 Wn. App. at 467 n.10 ("stray 'remarks, . . . when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue."), quoting parenthetically *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989), accord *Naficy v. Ill. Dep't of Human Servs.*, 697 F.3d 504, 511 (7th Cir. 2012); *Henry v. Wyeth Pharma., Inc.*, 616 F.3d 134, 150 (2d Cir. 2010).

respect to his veteran status discrimination claim. *See Elrod*, 939 F.2d at 1471. His evidence falls short. It consists of the following statements Alonso attributes to Martinez: (a) "I will tell you what I hate, people that served in the First Gulf War for five days and claim a disability."; (b) "I served and I got crap."; (c) "Did you know Vietnam was over in 1978?"; and (d) "Are you crazy or something?" Appellant's Br. at 6-7; CP 233.<sup>21</sup>

Alonso characterizes these statements as "overwhelming, direct evidence" of Martinez's "hatred of disabled veterans." Appellant's Br. at 23. Alonso misunderstands the meaning of "direct evidence," which "if believed, proves the fact [of discriminatory animus] without inference or presumption." *Coghlan*, 413 F.3d at 1095, quoting *Godwin*, 150 F.3d at 1221. Martinez's comments do not qualify: They do not contain an admission that Martinez acted against Alonso because he was a disabled veteran. Nor do they show even that Martinez was prejudiced against "the

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<sup>21</sup> Two additional allegations should not be considered because they lack support in the record. First, Alonso asserts that "Martinez also made comments to Alonso about 'crazy veterans.'" Appellant's Br. at 7. Yet no evidence shows that Martinez ever referred to Alonso or anyone else as a "crazy veteran." Alonso's declaration states that "Ben made comments *about* crazy veterans to me such as 'are you crazy or something,'" CP 233 (emphasis added), not that Martinez actually used the phrase "crazy veteran."

Second, Alonso claims that Martinez mocked him for his "speech impediment or 'Mexican accent' to his face." Appellant's Br. at 20. The only specific comment Alonso identifies, however, was that Martinez allegedly said Alonso talked like he was "from the ghetto." It is difficult to see how that comment might reveal anti-disability or anti-veteran animus. Because Alonso has not identified any "specific facts showing" that Martinez ever mocked his claimed speech impediment, *Frisino*, 160 Wn. App. at 776, this bare allegation is inadequate to show unlawful motive.

class to which the plaintiff belongs." *Id.* at 1095 n.6. Alonso has no direct evidence to support his disability and veteran-status discrimination claims.

To the extent Martinez's comments provide circumstantial evidence of animus, it is too meager to construct a "convincing mosaic" suggesting Martinez was biased against veterans or disabled persons. *See Troupe*, 20 F.3d at 737. As to anti-veteran bias, Alonso's only evidence is that Martinez asked Alonso if he knew that "Vietnam ended in 1978" and "are you crazy or something?" No reasonable person would conclude on the basis of these questions that Martinez, himself a veteran, is biased against veterans as a class. *See, e.g., Griffith*, 128 Wn. App. at 457-58 (Mormon plaintiff-employee did not satisfy his "burden of demonstrating [religious-based] animus" with evidence of polygamy jokes and question of "why he was running the Tacoma facility when he was not Jewish" because "[i]f workplace comments do not pertain to an individual's qualifications as an employee, they are 'stray remarks' that have no bearing in a claim for employment discrimination").<sup>22</sup> Moreover, Martinez's own past military service makes the inference of anti-veteran animus especially dubious. *See Hicks*, 509 U.S. at 513-14.

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<sup>22</sup> *See also Nidds*, 113 F.3d at 918-19 (9th Cir. 1996) (supervisor's comment about "old timers" was "ambiguous" and "not tied directly to [plaintiff's] layoff" and was therefore "weak evidence and not enough to create an inference of age discrimination").

Alonso's evidence of anti-disability animus is even flimsier. Only two of Martinez's purported comments even obliquely relate to disability: "I will tell you what I hate, people that served in the First Gulf War for five days and claim a disability," and "I served and I got crap." At most, these comments suggest a contempt for those who *claim* disability benefits under questionable circumstances, not an unlawful bias against those who are *actually disabled*. The former sort of animus is not actionable under a theory of disability discrimination for the obvious reason that it would provide no conceivable basis to act against an employee who *is* disabled. *See, e.g., Sawyer v. Trane U.S. Inc.*, No. 07-2032, 2008 WL 748375, at \*6 (W.D. Ark. Mar. 17, 2008) (supervisor's "expressed concern that Plaintiff . . . would attempt to falsely claim disability" is not "actionable under the ADA as the motivator of an adverse employment action because there is no evidence that [supervisor] perceived Plaintiff to suffer from an actual condition or injury that amounted to a disability"). Further, even if Martinez thought that some veterans undeservedly claimed disability benefits, it does not mean that he believed *Alonso* was faking a disability, or that he acted against him for that reason.

In sum, Alonso has no direct evidence of anti-veteran or anti-disability animus, and his circumstantial evidence provides no persuasive basis to infer that Martinez harbored any discriminatory motive.

**C. Alonso Cannot Establish a *Prima Facie* Case of Discrimination via the *McDonnell Douglas* Framework Because He Has Not Identified a Similarly Situated Coworker Who Received More Favorable Treatment**

Alonso also argues for reversal based on the *McDonnell Douglas* method of proof. To establish a *prima facie* case of disparate treatment under *McDonnell Douglas*, Alonso must show that "(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. & Health Services*, 80 Wn. App. 212, 226-27 (1996) (footnote omitted). Even assuming *arguendo* that an adverse action occurred, under *McDonnell Douglas* Alonso still must identify an employee who is "outside of the plaintiff's class," "subject to the same standards," and "engaged in the same conduct" as the plaintiff, but who did not suffer the same adverse employment action. *See Kirby*, 124 Wn. App. at 475 & n.16, citing *Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 641-42 n.17 (9th Cir. 2003). Alonso has failed to do so.

Alonso does not identify a single potential comparator. He alleges generally that Martinez subjected him to "heightened scrutiny" by requiring pre-approval of overtime, frequently checking in, and having Alonso call in at the beginning and end of his shift, and that this was not

"required of other workers Martinez supervised." Appellant's Br. at 30. But he offers no admissible evidence to support that assertion. On the contrary, the record reflects that Martinez required *all* his crew members to get his pre-approval for overtime. CP 47. Nor does Alonso identify any employee who retained their vehicle or cell phone after rotating off AQCB, or who kept an untidy workspace but was not criticized for it.<sup>23</sup> Instead of "set[ting] forth specific facts showing the existence of a genuine issue for trial," *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 776-77 (2011), Alonso makes sweeping claims that he was "treated differently than coworkers." Appellant's Br. at 31. Such broad, "conclusory statements . . . will not preclude a grant of summary judgment." *See Elcon*, 174 Wn.2d at 169.<sup>24</sup>

Alonso's disparate treatment claim fares no better under the *McDonnell Douglas* framework than under the direct evidence method. The trial court properly granted summary judgment on this claim.

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<sup>23</sup> Indeed, the section in Alonso's brief addressing the similarly situated element does not so much as *mention the name* of a single coworker, *see* Appellant's Br. at 31-33, never mind explain how they are "similarly situated in all material respects," *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006).

<sup>24</sup> *See also Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1423 (9th Cir. 1990) (affirming summary judgment to employer on age discrimination claim because plaintiffs "have not identified a single younger employee" who was treated more favorably).

## **II. Alonso's Hostile Work Environment Claim Fails**

To establish a prima facie hostile work environment claim, the plaintiff must allege facts proving that "(1) the harassment was unwelcome, (2) the harassment was because plaintiff was a member of a protected class, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer." *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 275 (2012) (brackets omitted), quoting *Antonius v. King Cnty.*, 153 Wn.2d 256, 261 (2004). Harassment is only actionable if it is "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Antonius*, 153 Wn.2d at 261, quoting *Glasgow v. Ga.-Pac. Corp.*, 103 Wn.2d 401, 406 (1985).

Alonso's hostile work environment claim is unmeritorious for three reasons: there is no evidence that Alonso's protected status motivated any of the conduct of which he complains; the offensive comments he alleges were too mild and isolated to have created an abusive working environment; and none of the supposed harassment is imputable to Qwest.

### **A. There Is No Evidence that Office Pranks Were Motivated by Alonso's Protected Status**

Alonso complains that several practical jokes amounted to workplace harassment: Zuniga once glued the shared office computer mouse to the mouse pad; an unidentified coworker placed a "greasy

substance" on the mouse and another time placed a "gooey liquid" on the shared office phone; and Alonso once found water on an office chair. Appellant's Br. at 13. Such pranks are too innocuous to have created an "abusive working environment." *Glasgow*, 103 Wn.2d at 406; *see, e.g., Faragher*, 524 U.S. at 788 (the "standards for judging hostility are sufficiently demanding to . . . filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'"), quoting B. Lindemann & D. Kadue, *Sexual Harassment in Employment Law* 175 (1992).

Moreover, the pranks are irrelevant to Alonso's hostile work environment claim because there is not one shred of evidence linking them to Alonso's protected status. Alonso has the burden to "produce competent evidence that supports a reasonable inference that [his protected status] was the motivating factor for the harassing conduct." *See Sangster v. Albertson's Inc.*, 99 Wn. App. 156, 161 (2000). Not only is the record devoid of evidence that the office antics were related to Alonso's Mexican heritage, veteran status, or disability, there is no evidence that any of the them were even *directed at him*. The four incidents—the glued mouse, the greasy mouse, the "gooey phone," and the wet chair—all occurred in an office that is shared by the entire crew. It is pure

speculation to suppose that Alonso was the target. And it is pure conjecture to claim that these pranks were motivated by Alonso's protected status. In the absence of any evidence to support that inference, the office pranks should not be considered in Alonso's hostile work environment claim. *See, e.g., Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 143 (2011) (considering in harassment claim only "conduct motivated by gender discrimination within the statute of limitations").<sup>25</sup>

**B. Offensive Comments by Alonso's Coworkers Did Not Affect the Terms and Conditions of His Employment**

Alonso's remaining evidence of harassment consists of comments about his speech or national origin, or about Mexican-Americans generally: Martinez's remarks discussed above; an employee's supposed comment that his own mother made sure he did not acquire a "Mexican accent"<sup>26</sup>; Zuniga's reference to "spics" in Alonso's presence; Zuniga's

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<sup>25</sup> *See also Alfano v. Costello*, 294 F.3d 365, 380 (2d Cir. 2002) ("exclud[ing] from consideration" in plaintiff's hostile work environment claim several incidents that "support no inference of sex-based hostility"); *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (affirming dismissal of harassment claim where none of defendant's alleged comments or actions were expressly focused on plaintiff's protected status).

<sup>26</sup> Alonso asserts in his brief that this comment was made by Martinez. *See* Appellant's Br. at 7-8. This allegation appears to confuse Martinez with Jose Zuniga. There is no evidence Martinez ever said anything about his mother wanting him to speak English without an accent. In support, Alonso cites no admissible evidence, only his complaint and a one page set of notes that were typed by his attorney. Appellant's Br. at 8, *citing* CP 3 and 240; *and see* CP 193; 63 ("Mom would say that 'you could be a rocket scientist, but that if you speak with an accent you will not be successful'").

supposed mimicry of Alonso's speech (of which there is no evidence that this was done in front of Alonso), *see* CP 142, and Zuniga's statement that he himself speaks "correct English." Appellant's Br. at 6-13. These sporadic and mostly cryptic co-worker comments fall well short of an actionable claim for a hostile work environment.

Whether an abusive working environment exists depends on "the totality of the circumstances, including 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." *E.g., Davis v. Fred's Appliance, Inc.*, \_\_ Wn. App. \_\_, 287 P.3d 51, 58 (2012). The conduct must be both "objectively and subjectively abusive." *Id.* "Conduct that is not severe or pervasive enough to create . . . an environment that a reasonable person would find hostile or abusive" is beyond the purview of antidiscrimination law. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). "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." *Washington v. Boeing Co.*, 105 Wn. App. 1, 10 (2000), citing *Glasgow*, 103 Wn.2d at 406.

Considering the "totality of the circumstances," the alleged comments to Alonso plainly do not amount to "severe or pervasive"

harassment. Even if true, the comments were isolated and infrequent and, in many cases, there is no evidence that Alonso even heard them. At worst, they were "merely . . . offensive," and there is no evidence that they "unreasonably interfere[d] with [Alonso's] work performance." *See Washington*, 105 Wn. App. at 11; *cf. Davis*, 287 P.3d at 58 (finding no hostile work environment where plaintiff was repeatedly called "Big Gay Al" as often as three times in one week). Even if somewhat insulting, the sporadic and ambiguous comments of Alonso's coworkers are "too few, too separate in time, and too mild . . . to create an abusive working environment." *See Alfano*, 294 F.3d at 380.<sup>27</sup> The "[c]asual, isolated," and "trivial" jibes of Alonso's coworkers did not alter the terms or conditions of his employment. *Washington*, 105 Wn. App. at 10.

While the remarks and behavior of Alonso's coworkers may have been juvenile, that is not enough to create a hostile work environment. *See Faragher*, 524 U.S. at 788. The treatment of which Alonso complains was not severe or pervasive harassment.

**C. None of the Alleged Harassment Is Imputable to Qwest**

Even if the behavior were severe and pervasive, and even if Alonso could somehow link it to his protected status, his hostile work

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<sup>27</sup> Moreover, the fact that Alonso himself engaged in racial and other mean-spirited name-calling—calling one coworker "Decker" because he was African American and another "Tiny" because he was short in stature—undercuts his claims of emotional injury. CP 63, 66.

environment claim still fails because it is undisputed that Qwest took prompt, effective action once Alonso complained. Any harassment Alonso experienced thus cannot be imputed to Qwest.

Where an "owner, manager, partner or corporate officer personally participates" in workplace harassment, the employer is vicariously liable. *Glasgow*, 103 Wn.2d at 407. Where the malefactors are merely "supervisor(s) or co-worker(s)," liability may be imputed to the employer only if it "(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *Id.* The *Glasgow* rule "clearly distinguishes between, on one hand, the class of persons so closely connected to the corporate management that their actions automatically may be imputed to the employer and, on the other hand, the employee's supervisors and coworkers." *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 853-54 (2000).

Martinez is not an "owner"/"manager" under *Glasgow*. He was a first-level supervisor rather than part of the corporate hierarchy acting as Qwest's "alter ego." CP 46-47; *see, e.g., Francom*, 98 Wn. App. at 856 (alleged harasser not a manager under *Glasgow*; "[a]lthough he supervised and even hired other employees, it is undisputed that [he] was simply a mid-level manager at one of Costco's 200 warehouses"). Martinez's conduct is imputable to Qwest only if it knew or should have known of the

harassment and failed to take reasonably prompt remedial action. And while Alonso's brief repeatedly blames Martinez for the conduct of Alonso's co-workers, *see, e.g.*, Appellant's Br. at 6, no admissible evidence supports the claim.

Even if one assumes that the conduct Alonso alleges did qualify as unlawful harassment, it is undisputed that Qwest immediately took action to investigate and address Alonso's complaints. Alonso made a series of complaints to the Qwest hotline over a four-week period between April 30, 2010 and May 25, 2010. Qwest assigned an investigator to determine whether there had been a violation of Qwest policy. Qwest determined there had not been any retaliation. More importantly, Alonso reported to Qwest no instances of harassment after May 2010.<sup>28</sup> In other words, once Alonso complained, the unwelcome conduct stopped. There can be no employer liability here.

Because most of the alleged harassment bears no relation to Alonso's protected status, because the remaining comments were not severe or pervasive, and because none of the conduct is imputable to

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<sup>28</sup> Alonso claims that Martinez "harass[ed]" him in September 2011 after Alonso misplaced a "P-touch" labeling machine. The only evidence in support of this alleged harassment was an email from Martinez asking Alonso if he had called the central office supervisor to report that the machine was lost. CP 239, 247. This is a far cry from harassment, and Alonso did not call the employee hotline or otherwise complain about this episode to Qwest.

Qwest, the trial court correctly granted summary judgment on Alonso's hostile work environment claim.

### **III. Alonso's Retaliation Claim Fails**

To establish a *prima facie* case of retaliation under the WLAD, "an employee must show that (1) [he] engaged in a statutorily protected activity, (2) [his] employer took adverse employment action against [him], and (3) there is a causal link between the activity and the adverse action." *Short v. Battle Ground Sch. Dist.*, 169 Wn. App. 188, 205 (2012). Alonso can establish none of the three elements.

#### **A. Alonso Did Not Engage in Statutorily Protected Activity**

An employee engages in activity protected by the WLAD's anti-retaliation provision where he "opposes employment . . . practices" forbidden by the antidiscrimination chapter or practices he "reasonably believed to be discriminatory." *Short*, 169 Wn. App. at 205 (emphasis omitted), quoting *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 619 (2002).

An employee's grievance must be specific enough to give "fair notice" to the employer that a discriminatory practice has occurred. *Cf. Kasten St.-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1334 (2011) (retaliation under federal Fair Labor Standards Act). Thus, a "general complaint about an employer's unfair conduct does not rise to the

level of protected activity in an action for . . . discrimination under the WLAD absent some reference to [the plaintiff's protected status]." *Shelley v. Bank of Am., N.A.*, No. CV-10-5124 RMP, 2011 WL 5835126 (E.D. Wash. Nov. 21, 2011), citing *Graves v. Dep't of Game*, 76 Wn. App. 705, 712 (1994) (plaintiff did not engage in protected activity because she did not make "complaints of discrimination on the basis of sex"; she complained that her supervisor "was not spending enough time with her, was not training her sufficiently, and was expecting too much of her").<sup>29</sup> In other words, "abstract grumblings or vague expressions of discontent" do not qualify as protected activity. *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 626 (5th Cir. 2008) (plaintiff's objection to schedule change was not protected activity because he "did not frame *any* of his objections in terms of the potential illegality of the change").

Alonso did not engage in protected activity. Although he complained to Rybicki and Qwest's employee hotline that Martinez was treating him unfairly, he never mentioned that he was being "singled out"

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<sup>29</sup> See also *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 135-36 (3d Cir. 2006) ("it must be possible to discern from the context of the statement that the employee opposes an unlawful employment practice"), citing *EEOC v. Crown Zellerbach*, 720 F.2d 1008, 1012-13 (9th Cir. 1983). Compare *Crown Zellerbach*, 720 F.2d at 1011-13 (plaintiff engaged in protected activity by writing letter accusing his employer of "racism" and "discrimination"), with *Pool v. VanRheen*, 297 F.3d 899, 910-11 (9th Cir. 2002) (plaintiff did not engage in protected activity because her complaints did not mention discrimination), and *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411-12 (9th Cir. 1987) (same).

*on account of discrimination. See CP 75. Qwest's hotline record of Alonso's complaints reveals an array of gripes, but not one even remotely suggestive of discrimination.*<sup>30</sup> His complaints did not express opposition to discriminatory employment practices and thus do not qualify as protected activity. *See Vasquez v. State, Dep't of Soc. & Health Servs.*, 94 Wn. App. 976, 989 (1999) ("the record does not support an inference [plaintiff's] activities were directed to opposing discrimination" because although he "clearly believed" the employer's investigation "was abusive and wrong[,] . . . there is no indication he opposed it on grounds of unlawful discrimination").

Alonso contends that Qwest's hotline record was "not complete as to his comments and complaints" because "during his deposition, Alonso repeatedly and specifically testified that he reported 'prejudice' to the hotline." Appellant's Br. at 8. But Alonso's deposition testimony shows that he used the word "prejudice" to mean *not* class-based *discrimination* but rather something akin to cronyism or favoritism. Asked what he meant by "prejudice," Alonso explained: "You prefer one people rather

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<sup>30</sup> Alonso complained that Martinez "allows vulgar conversation of a sexual nature and profanity in the workplace," CP 81; that "individuals that laugh at the behavior are shown favoritism and given better assignments and overtime," *id.*; that Alonso's union representative "is rude and makes false accusations against employees," *id.*; that Martinez "has taken away his overtime" and "only gives overtime to his favorite Employees," CP 82; that coworkers had "put grease on the desk as a practical joke," CP 86; and that Martinez "had begun to question Joseph's work and performance," CP 79.

than others. . . . You make a separation; you make a distinction based on whatever they want to make it. That's what I understand by being prejudice [sic]." CP 108. He then elaborated that Martinez was prejudiced by "favoring anybody that would—was corrupt like him. . . . I would not go for that and they used to tease me . . . ." *Id.* The WLAD "does not outlaw cronyism." *Cf. Foster v. Dalton*, 71 F.3d 52, 56 (1st Cir. 1995). Alonso's own description of his complaints belies his revisionist assertion that he was objecting to discrimination. Alonso has not shown that he engaged in statutorily protected activity.

**B. Qwest Did Not Take any Adverse Employment Action Against Alonso**

Alonso also cannot establish the second element of his retaliation claim—that Qwest took an adverse employment action against him. In Washington, the standard governing "adverse employment action" in the retaliation context is the same as in the discrimination context: it must involve "a change in employment conditions that is more than an 'inconvenience or alteration of job responsibilities,'" such as "reducing an employee's workload and pay." *E.g., Campbell*, 129 Wn. App. at 22 (retaliation), quoting *Kirby*, 124 Wn. App. at 465 (discrimination). For the reasons explained above in the context of Alonso's disparate treatment claim, he has not identified any step taken by Qwest that would qualify as

an adverse employment action for his retaliation claim under this standard.<sup>31</sup>

**C. Alonso's Evidence of Causation Is Insufficient**

Even if Alonso could establish that he engaged in protected activity and suffered an adverse employment action, his retaliation claim also fails on the third element: he lacks sufficient evidence of a causal nexus between his complaints and any action taken against him by Qwest.

Alonso's only evidence of causation consists of the temporal proximity between his hotline complaints and the supposed adverse actions: his complaints came between April 30 and May 25, 2010, and Martinez transferred him to the central office around the same time. It is true that "proximity in time between the protected activity and the employment action" can support the element of causation, provided it is "coupled with" other evidence of retaliatory motive. *E.g., Anica v. Wal-*

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<sup>31</sup> Following the U.S. Supreme Court's decision in *White*, 548 U.S. 53, federal courts apply a more expansive standard to define "adverse employment action" in the retaliation context. Under that standard, a retaliation plaintiff need only show that "the employer's actions" were "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* at 57. No published decision in Washington has adopted the *White* standard. But even if this standard applied to Alonso's retaliation claims, no adverse employment action has occurred. Alonso's transfer from AQCB to central office work was not objectively adverse because it is undisputed that most employees *preferred* the central office, which afforded more opportunities for overtime pay. Martinez's criticism of Alonso's "mess" and frequent check-ins are precisely the type of "petty slights" and "minor annoyances" that the *White* Court specifically disclaimed as actionable conduct. 548 U.S. at 68. And Alonso's alleged loss of equipment and desk priority are "trivial harms" that would not "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Id.* Under any standard, Alonso's job changes were not objectively and materially adverse.

*Mart Stores, Inc.*, 120 Wn. App. 481, 491 (2004). But by itself, temporal proximity is rarely (if ever) enough to create a triable issue. *See, e.g., id.* at 489 ("[Plaintiff] argues that the timing of the termination, specifically its proximity to her return to work . . . , provides enough evidence. [Her] timing argument relies on a logical fallacy—post hoc, ergo propter hoc or 'after this, therefore because of this.' But coincidence is not proof of causation.").<sup>32</sup> Moreover, in this case, Martinez testified that he made the decision to reassign Alonso before he learned Alonso had called the Qwest hotline and Alonso offers nothing in rebuttal.

Alonso's timing evidence is insufficient as a matter of law to establish a causal link between his complaints and any adverse action.

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<sup>32</sup> *See also Tyner*, 137 Wn. App. at 565-66 (plaintiff's "assertion that the temporal relationship between" protected activity and her transfer "is insufficient to defeat summary judgment"); *Kasten v. St.-Gobain Performance Plastics Corp.*, \_\_\_ F.3d \_\_\_, 2012 WL 5971209, at \*7 (7th Cir. Nov. 30, 2012), *on remand from* 131 S. Ct. 325 (2011) ("mere temporal proximity . . . will rarely be sufficient in and of itself to create a triable issue" as to causal link); *Annett v. Univ. of Kan.*, 371 F.3d 1233, 1240 (10th Cir. 2004) (temporal proximity alone is never enough); *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 199 n.10 (3d Cir. 1996) (same).

**CONCLUSION**

For the foregoing reasons, Qwest respectfully requests that the decision of the trial court be affirmed in its entirety.

DATED: December 21, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 21, 2012, I caused the foregoing document to be served on the following counsel of record, via hand delivery:

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DATED this 21st day of December, 2012.

  
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Janet Davenport, Legal Secretary

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