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DIVISION II

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STATE OF WASHINGTON

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

VICTOR CELIS,

Appellant,

v.

CITY OF LAKEWOOD,

Respondent.

BRIEF OF APPELLANT

NELSON C. FRALEY
Attorney for Appellant
Faubion Reeder Fraley & Cook PS
5920 100th St SW Ste 25
Lakewood, WA, 98499-2751

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted Respondent's motion for summary judgment because there were issues of material fact as to whether Appellant was discriminated against in violation of RCW 49.60 et. seq. by Respondents.

2. The trial court erred when it ruled that Appellant's resignation was voluntary.

Issues Pertaining to Assignment of Error:

1. Does the presentation of circumstantial evidence of discrimination preclude a grant of summary judgment?

(De Novo)

2. Does a material issue of fact exist when a Plaintiff presents evidence of a similarly situated Caucasian employee, within his former department, who was not terminated from his position as the ethnic minority employee?

(De Novo)

3. Does a material of fact exist when a Plaintiff presents evidence that he had no other choice than to resign or be terminated from his position.

(De Novo)

B. STATEMENT OF THE CASE

On November 12, 2010, former Lakewood Police Officer Victor Celis was constructively discharged from his employment with the City of Lakewood Police Department (LPD). Officer Celis was hired onto the LPD on August 30, 2004. During his tenure with the LPD, Celis received no discipline and served as a temporary Sergeant. Clerk's Papers 402-525.

In his annual review of 2007, then LPD Chief Larry Saunders wrote "Vic has done an exceptional [sic] job as an acting sergeant in patrol. He is ready now for promotion to sergeant." Id. "Officer Celis is a highly motivated Traffic Officer whose efforts have contributed significantly to the improvement of traffic safety in the City of Lakewood" according to Off. Celis' supervisor, Sergeant Ralph Evans, in 2008. Id., Exh. 3. Throughout Celis' tenure with the LPD he was consistently rated as satisfactory and as a superior officer in his six years with the LPD. See generally Id., Exhs 1-6.

In his evaluation of 2008, Off. Celis received a citizen commendation and the LPD Core Values award for apprehending and obtaining a confession from a burglary suspect. Id., Exh.3. Sgt. Evans, Celis' supervisor, believed Celis to be an informal leader in the department and recommended Celis for promotion to Sergeant. Id. Off.

Celis' performance as a member of the LPD was commended by LPD Chief Farrar in 2009. Clerk's Papers 526-530. Celis' action were also commended by the Chief of Police for the Fife Police Department. Id.

Late in 2008, Off. Celis had an investigation launched against him by the LPD. The investigation was initiated due to a citizen, Ms. Hannah Rudnick, being issued a traffic citation by Celis. The sustained investigation found that Celis spoke to Ms. Rudnick about off-duty work for which he was owed payment by Ms. Rudnick's company. The encounter with Ms. Rudnick was by happenstance. Chief Farrar "administered the corrective action of counseling to Officer Celis for these sustained violations of policy." Clerk's Papers 531-648, page 2, lines 18-19. According to Chief Farrar, "This could not be used against him later in a disciplinary action. It was coaching and counsel." Dep. Of Farrar, pg. 20, lines 2-3. "Records of positive and negative counseling are mandated in supervisory performance file until the next annual performance review. They are then purged." Clerk's Papers 402-525, lines 16-18. Moreover, according to Chief Farrar, the Rudnick sustained finding could not be appealed or grieved through the union because counseling or corrective action was not considered "discipline", and only disciplinary issues may be appealed or grieved through the collective

bargaining agreement of the Lakewood Police Independent Guild (LPIG).

See generally *Id.*, pg. 17, line 3 – pg. 20, line 18.

Plaintiff does not contest his actions for which he was terminated from the LPD. He took full responsibility for his actions, apologized for his actions and disclosed that he was seeking treatment and counseling for the alcohol use. Clerk's Papers 526-530, Exhibit A.

On November 1, 2010, Chief Farrar issued a Command Disposition Report. Clerk's Papers 531-648, Exh. 2. A command disposition report is Chief Farrar's "final determination of the outcome of the investigation and what, if any, discipline there may be." Clerk's Papers 402-525, pg. 14, lines 8-10. As of November 1, 2010, Chief Farrar recommended terminating Celis' employment. Clerk's Papers 531-648, Exh. 2. Chief Farrar denied making a recommendation to terminate the employment of Celis from the LPD. Clerk's Papers 402-525, pg. 21, lines 5-7.

On November 12, 2010, Off. Celis tendered his resignation despite Chief Farrar having recommended termination on November 1, 2010. Clerk's Papers 531-648, Exhs. 2&3.

Celis named Officers Joe Kolp, Shawn Noble, Chris Bowl, Jim Lofland, and Brent Prante as individuals who committed crimes or were

arrested for their conduct and were not terminated from their employment with the City of Lakewood. Clerk's Papers 402-525, pg. 41, lines 3-16.

Joe Kolp was arrested for domestic violence in 2007. Ultimately, however, no charges were filed against Off. Kolp. Clerks' Papers 264-348, page 5, para 7, Exhs 4 & 5, and Clerk's Papers 531-648. Off. Kolp had sustained findings against him by Chief Farrar for violations of truthfulness, authorized use of Assigned Vehicles, violating the Ride-Along Program, and violating proper protocol for Reports and Records. Id at Exh. 5.

On Dec. 21, 2008, Off. Jim Lofland reported to duty wearing a Lakewood PD uniform. Apparently, Off. Lofland drove his assigned LPD marked patrol car while intoxicated. A Sgt. Frazer noticed Off. Lofland was visibly impaired and noted the odor of intoxicants being clearly present. Off. Lofland was administer a portable breath test that registered a BAC of .142 reading at 1830 hours (6:30 p.m.). At 2113 and 2116 (9:13 p.m., and 9:16 p.m.) Off. Lofland's BAC DataMaster Tests registered .156 and .149 respectively. Off. Lofland admitted to being under the influence of intoxicants on Dec. 21, 2008. The Command Disposition Report sustained findings that Off. Lofland had violated laws and ordinances and that he was under the influence of alcohol during his shift. Chief Farrar found that Off. Lofland violated RCW 46.61.502 Driving under the

influence. Officer Lofland suffered a suspension of 80 hours as discipline. Id at Exh. 9, and Clerk's Papers 531-648.

Off. Chris Bowl was arrested for domestic violence in the City of Dupont on September 30, 2009. Id at para. 12.

According to Chief Farrar, Off. Shawn Noble was arrested for DUI one month before Plaintiff resigned. Off. Noble eventually pled to first degree negligent driving. For the offense in which he was arrested and convicted, Chief Farrar decided to impose a suspension of 80 hours. Id at para. 10.

Brent Prante was investigated by the LPD in the summer of 2012 for having a physical altercation with a citizen and then identifying himself as an LPD officer. His eventual discipline was a 10 hour suspension and a 1 year disciplinary probation. At Off. Prante's Pre-Disciplinary Hearing, Chief Farrar considered a 1 day suspension along with Disciplinary Probation. Id at para. 14, Exh. 10. Clerk's Papers 531-648.

Joe Kolp, Jim Lofland, Shawn Noble, Chris Bowl, and Brent Prante are all Caucasian. Clerk's Papers 402-525, pg. 39 ln. 4 – pg. 42, ln. 9, and Clerk's Papers 526-530.

Between the time that Asst. Chief Zaro ascended to his current position and November 12, 2010, Celis made at least 2 verbal complaints

to Zaro regarding racial comments made Off. Dan Tenney in the presence of Zaro. Clerks' Papers 402-525, pgs 49, line 15 – pg. 56. When Celis lodged complaints about Tenney's comments to Asst. Chief Zaro, Zaro denied even hearing the Tenney comments despite being made in his presence. *Id.* Moreover, Celis was concerned about getting on the "bad side" of either Chief Farrar and Asst. Chief Zaro, so he kept quiet after a period of time in order to avoid confrontation. *Id.* at pg. 61, ln. 8 – pg. 62, ln. 15. Celis knew that Farrar and Zaro did not take his complaints seriously.

According to an investigation conducted by the department in late 2013, Officer Dan Tenney claimed that Celis teased "him about being part of the Aryan Brotherhood." *Id.*, pg. 61, lines 10-17. This confirmed to Celis that Tenney had expressed some racial animus to Celis.

According to Chief Farrar he was photographed at a bar in Washington D.C. with two other Lakewood Police Officers, Sgt. Karen Shadow and Lt. Heidi Hoffman. All three officers have their badges showing in a non-official capacity in a drinking establishment. *Id.*, Exhibit 10 and Dep. of Farrar, pg. 55, lines 23-25, pg. 56, lines 1-20.

C. SUMMARY OF ARGUMENTS

The trial court erred when it granted Respondent's motion for summary judgment because there were genuine issues of material fact as

to whether Appellant was discriminated against in violation of RCW 49.60 et. seq. Additionally, Appellant presented evidence that his resignation was not voluntary thereby overcoming the presumption of Molsness v. City of Walla Walla, 84 Wash. App. 393 (1996).

D. ARGUMENTS

I. Summary Judgment Standard of review

In reviewing a summary judgment order, the appellate court conducts the same inquiry as the trial court. Parry v. Windermere, 102 Wn. App. 920, 10 P.3d 506 (2000). The court reviews questions of law de novo. Id. Summary judgment is appropriate when no genuine issue of material fact exists, thus entitling the moving party to judgment as a matter of law. Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co., 104 Wn. App. 597, 601, 17 P.3d 626 (2000), review denied, 143 Wn.2d 1023 (2001). The court must consider evidence and all reasonable inferences therefore in the light most favorable to the nonmoving party. Magula v. Benton Franklin Title Co., 131 Wn.2d 171, 182, 930 P.2d 307 (1997).

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law." Atherton Condo. Apart.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516 (1990) (quoting CR 56(c)). "A material fact is one upon which the outcome of the litigation depends in whole or in part." Atherton, 115 Wn.2d at 516. We consider the evidence in the light most favorable to the nonmoving party. Gerken v. Mut. of Enumclaw Ins. Co., 74 Wn.App. 220, 224-25 (1994).

A defendant in a civil action is entitled to summary judgment if he can show that there is an absence or insufficiency of evidence supporting an element that is essential to the plaintiff's claim. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 (1989). "In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Young, 112 Wn.2d at 225 (internal quotation marks omitted) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). The plaintiff may not rely on the allegations in the pleadings but must set forth specific facts showing that a genuine issue exists. Young, 112 Wn.2d at 225.

II. The Scope of RCW Chapter 49.60

Washington's central prohibition against employment discrimination appears in the Washington Law Against Discrimination, RCW Chapter 49.60 ("WLAD"), a broadly worded statute which declares:

The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to: (a) The right to obtain and hold employment without discrimination....

RCW 49.60.030(1). An amendment in 2006 added "sexual orientation." In 2007, an amendment added veteran/military status and clarified the disability definition (reversing the adoption of a narrower definition of disability under the federal Americans with Disabilities Act of 1990 in McClarty v. Totem Electric, 157 Wn.2d 214, 137 P.3d 844 (2006)).

Public employers generally are covered by the WLAD because the definition of "employer" incorporates the definition of "person" as "any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof." RCW 49.60.040(1) and (3). The State of Washington has waived its sovereign immunity for claims of discrimination, although a notice of claim must be filed under RCW 4.92 (claims against the state) or 4.96

(claims against cities, towns, counties and political subdivisions) before one sues the government. Public employers are prohibited from “discriminating against or granting preferential treatment” on the basis of race, sex, color, ethnicity or national origin, RCW 49.60.400, although the statute does not prohibit reliance on any of these characteristics to break a tie between equally qualified candidates. Parents Involved v. Seattle School District No. 1,149 Wn.2d 660, 689-90, 72 P.3d 151 (2003).

Supervisors and managers can be sued under RCW 49.60 because section .040(3) defines “employer” to include “any person acting in the interest of an employer,” although only if they work for an employer which has at least eight employees. Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 357-61, 20 P3d 921 (2001). Also, one may sue employees (other than supervisors or managers) of covered employers who “aid, abet, encourage, or incite” unlawful practices under RCW 49.60.220. Pannell v. Food Services of America, 61 Wn. App. 418, 439-40, 810 P.2d 952 (Div. I, 1991), *rev. den’d*, 118 Wn.2d 1008, 824 P.2d 490 (1992). But a co-worker who does not supervise, manage or have the ability to influence the plaintiff’s employment will not be liable under section .220. Jenkins v. Palmer, 116 Wn. App. 671, 674-7, 66 P.3d 1119 (Div. II, 2003). Employees of equal rank cannot sue each other for retaliation under RCW

49.60.210. Malo v. Alaska Trawl Fisheries, 92 Wn. App. 927, 965 P.2d 1124 (Div. I, 1998), *rev. den'd*, 137 Wn.2d 1029, 980 P.2d 1284 (1999).

The Washington State Human Rights Commission has authority to investigate complaints of violations of the WLAD, (RCW 49.60.120), but one need not exhaust this administrative remedy before suing under RCW Chapter 49.60. *See*: WAC 162-08-061, 062; Human Rights Commission v. Cheney School District, 97 Wn.2d 118, 124, 641 P.2d 163 (1982); Mutual of Enumclaw v. Human Rights Commission, 39 Wn. App. 213, 692 P.2d 882 (Div. I, 1984). Nor must other administrative remedies be exhausted prior to bringing a private WLAD claim. Smith v. Bates Technical College, 139 Wn.2d 793, 808-11, 991 P.2d 1135 (2000).

Nor is one required to exhaust the grievance arbitration procedures of a collective bargaining contract before suing under the WLAD. Reese v. Sears Roebuck Co., 107 Wn.2d 563, 578, 731 P.2d 497 (1987), overruled on other grounds in Phillips v. Seattle, 111 Wn.2d 903, 766 P.2d 1099 (1989); Morales v. Westinghouse Hanford Co., 73 Wn. App. 367, 869 P.2d 120 (Div. III, 1994); *rev. den'd*, 124 Wn.2d 1019, 861 P.2d 254; Bruce v. Northwest Metal Products, 79 Wn. App. 505, 512-3, 903 P.2d 506 (Div. II, 1995), *rev. den'd*, 129 Wn.2d 1014, 917 P.2d 575 (1996). However, if one has taken a grievance to arbitration, the arbitration award might have collateral estoppel effect on subsequent judicial claims. *See*

e.g.: Robinson v. Hamed, 62 Wn. App. 92, 96-101, 813 P.2d 171 (Div. I, 1991), *rev. den'd*, 118 Wn.2d 1002, 822 P.2d 171.

III. Liberal Construction of RCW 49.60.

The Legislature gave a strong statement of policy when it adopted the WLAD:

The legislature hereby finds and declares that practices of discrimination against any of its inhabitants ... are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

RCW 49.60.010. Accordingly, the Legislature has directed that “The provisions of this chapter are to be liberally construed for the accomplishment of the purposes thereof.” RCW 49.60.020. The purpose of the WLAD is to deter and eradicate discrimination, a public policy of the highest priority. Hill v. BCTA Income Fund-I, 144 Wn.2d 172, 179, 23 P.3d 440 (2001); Blaney v. International Assoc. of Machinists and Aerospace Workers, 151 Wn.2d 203, 214, 87 P.3d 757 (2004). Courts have applied the principal of broad construction to resolve questions of the scope of the WLAD's coverage (e.g.: F.O.E. Tenino Aerie no. 564 v. Grand Aerie of F.O.E., 148 Wn.2d 224, 255, 59 P.3d 655 (2002); Brown, 143 Wn.2d at 357; Marquis, 130 Wn.2d at 108), to the plaintiff's burden of proof (e.g., Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302,

309-10, 898 P.2d 284 (1995); Xieng v. Peoples National Bank, 120 Wn.2d 512, 521, 844 P.2d 389 (1993)); and to remedies (*e.g.*: Blaney, 151 Wn.2d at 215-6; Martini v. Boeing, 137 Wn.2d 357, 364, 971 P.2d 45 (1999); Goodman, 127 Wn.2d at 406).

The remedial purpose of the WLAD means that its provisions are to be liberally construed and its exceptions narrowly confined. Phillips v. City of Seattle, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989); F.O.E. Tenino Aerie No. 564, 148 Wn.2d at 247. The WLAD is to be liberally construed in order to encourage private enforcement. Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 829 P.2d 196 (Div. I, 1992), *reversed on other grounds*, 124 Wn.2d 634, 880 P.2d 29 (1994); Marquis, 130 Wn.2d at 108 (“We view with caution any construction that would narrow the coverage of the law”).

IV. Disparate treatment

Washington law recognizes employment discrimination claims for disparate treatment, disparate impact, and reasonable accommodation, each with different burdens of proof. Retaliation claims are authorized by statute.

Disparate treatment is intentional discrimination. It is “the most easily understood type of discrimination” that occurs when “(t)he employer simply treats people less favorably than others because of their

race, color, religion, sex ... national origin” or some other protected characteristic. Shannon v. Pan 'N Save, 104 Wn.2d 722, 726-7, 709 P.2d 799, 803 (1985).

Most employment discrimination claims are based on a disparate treatment theory. These commonly involve complex and disputed circumstantial evidence because “(e)mployers infrequently announce their bad motives orally or in writing.” deLisle v. FMC Corp., 57 Wn.App. 79, 82-83, 786 P.2d 839 (Div. I, 1990), *rev. den'd*, 114 Wn.2d 1026, 793 P.2d 974 (1990); Renz v. Spokane Eye Clinic, 114 Wn.App. 611, 621-2, 60 P.3d 106 (Div. III, 2002). The courts have recognized that “(d)irect, smoking gun evidence of discriminatory animus is rare since there will seldom be eyewitness testimony as to the employer's mental processes” (internal citation omitted), Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179, 23 P.3d 440 (2001). Indeed, “(c)ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” Desert Palace v. Costa, 539 U.S. 90, 123 S.Ct. 2148, 2154 (2003). Shifting or contradictory explanations for the employer’s termination decision may also support a fact finding of improper motive. Johnson v. Express Rent & Own, Inc., 113 Wn.App. 858, 862, 56 P.3d 567 (Div. II, 2002). “Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of

intentional discrimination and it may be quite persuasive ... the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.” Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000).

a. The "Substantial Factor" Test

The ultimate question of fact in every disparate treatment case is whether discriminatory motive was a “substantial factor” in the challenged decision. Mackay v. Acorn Custom Cabinetry, 127 Wn.2d 302, 310, 898 P.2d 284 (1995); *WPI 330.01*. This is a “pure question of fact.” Johnson v. D.S.H.S., 80 Wn.App. 212, 229, 907 P.2d 1223 (Div. II, 1996). “The jury should decide this question after deliberation, rather than courts deciding based upon the same facts as a matter of law.” Phillips v. Seattle, 111 Wn.2d 903, 909, 766 P.2d 1099 (1989). The “substantial factor” test applies to claims under RCW Ch. 49.60, Allison v. Housing Authority of City of Seattle, 118 Wn.2d 79, 821 P.2d 34 (1991), as well as for common law claims, Wilmot v. Kaiser Aluminum and Chemical Corp., 118 Wn2d 46, 69-73, 821 P.2d 18 (1991).

Washington does not require the employee to prove her/his protected status was the “motivating factor” or the only factor for the employer’s decision, nor that he would have been retained “but for” his protected status. *MacKay*, 127 Wn2d at 310; Kastanis v. Educational

Employees Credit Union, 122 Wn.2d 483, 491, 859 P.2d 26, 30 (1993), *as amended by* 122 Wn.2d 483, 865 P.2d 507 (1994). Washington courts recognize that the employer may be motivated by many reasons of which one may be an illegal motive; it is “unfair to erect the high barrier to recovery implicated by requiring an employee to show an illegal motive was more than a substantial factor.” *MacKay*, 127 Wn.2d at 311.

b Shifting Burdens

Courts use a shifting burden analysis on both disparate treatment and disparate impact claims, but the analysis is quite different in the two types of claims. Disparate treatment claims typically focus on the single factual issue of whether illegal intent was a substantial factor in the employer’s action. The shifting burden in a disparate treatment claim is only the burden of *producing* enough evidence to create a triable issue of fact as to the employer’s intent. For a disparate impact claim, the burden is *persuading* the trier of fact on distinct factual issues.

The burden shifting analysis for a disparate treatment claim originated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 and was clarified in *Reeves v. Sanderson Plumbing Prods. Inc.*, *supra*. Washington adopted this analysis in Hill v. BCTI Income Fund-I, *supra*. Anica v. Wal-Mart Stores, Inc., 120 Wn.App. 481, 488, 84 P.3d 1231 (Div. I, 2004).

First, the employee must make out a prima facie case; this establishes a rebuttable presumption. Second, the burden then shifts to the employer to produce admissible evidence of a legitimate, nondiscriminatory reason for the action; this is merely a burden of production, not of persuasion. If the employer fails this burden, the employee is entitled to a determination of liability as a matter of law. But if the employer produces some evidence of a nondiscriminatory motive, the initial presumption of the plaintiff's prima facie case is rebutted and removed. Third, the burden then shifts back to the employee who must create a genuine issue of material fact for trial by showing the employer's stated reason for the adverse action was pretext for an illegal motive. *Hill*, 144 Wn.2d at 182-3; *Grimwood*, 110 Wn.2d at 365. The plaintiff can demonstrate the employer's reasons are not worthy of belief with evidence that the reasons have no basis in fact, the employer was not motivated by these reasons, or the reasons were not sufficient to motivate the employer's action. *Renz*, 114 Wn.App. at 618-9; *Hill*, 144 Wn.2d at 184-6.

If the plaintiff meets this burden, the *McDonnell Douglas* analysis is finished and the case proceeds to trial on the central factual question of the employer's illegal intent. If the plaintiff fails this burden, the employer is entitled to dismissal as a matter of law. *Kastanis*, 122 Wn.2d at 490; *Grimwood*, 110 Wn.2d at 363.

Keep in mind that the disparate treatment burden shifting analysis is designed only for pre-trial motions and juries should not be instructed on it. *See: Kastanis*, 122 Wn.2d at 490; *Burnside*, 66 Wn.App. at 523; *Hill*, *supra*; *see also*: comments to *WPI 330.01*. The *McDonnell Douglas* analysis “was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.” *Hill*, 144 Wn.2d at 181, n.2; *Grimwood*, 110 Wn.2d at 363. “Above all, it should not be viewed as providing a format into which all cases of discrimination must somehow fit.” *Id.*

c Prima Facie Case

Washington courts have recognized at least two types of prima facie case: (a) some variant of the *McDonnell Douglas* formulation and (b) a comparison showing different treatment of similarly situated employees. “The elements of the prima facie case are not rigid.” *Cuff v. CMX Corp.*, 84 Wn.App. 634, 637-8, 929 P.2d 1136 (1997); *Johnson*, 80 Wn.App. at 227 n.21 (elements of a prima facie case “should be used flexibly to address the facts in different cases”); *Parsons v. St. Joseph's Hosp. & Health Ctr.*, 70 Wn.App. 804, 809, 856 P.2d 702 (Div. II, 1993) (“A plaintiff ... can ... meet his or her burden of production in any way which yields evidence from which a rational trier of fact could find unlawful

discrimination ...”). A plaintiff can rely wholly on circumstantial evidence in making a prima facie case. *Hill*, 144 Wn.2d at 180.

The *McDonnell Douglas* formulation of a prima facie case depends upon the type of claim. For example, in a refusal to hire/promote claim, the plaintiff must show he or she belongs to a protected class, was qualified for the work sought, was rejected for the position, and that the employer continued to seek qualified applicants or hired someone outside the protected class. *Shannon*, 104 Wn.2d at 726-7. For wrongful termination, the plaintiff must show she or he is a member of the protected class, had satisfactory job performance, was discharged from employment, and was replaced by someone outside the protected class. *Kirby v. City of Tacoma*, 124 Wn.App. 454, 468, 98 P.3d 827 (Div. II, 2004).

A prima facie case based on comparisons is a showing that the employee is in a protected class and was treated differently from someone who is similarly situated but outside the protected class. *See: Marquis v. Spokane*, 130 Wn.2d 97, 113-5, 922 P.2d 43 (1986); *Washington v. Boeing*, 105 Wn.App. 1, 13, 19 P.3d 1041 (Div. I, 2000); *Johnson*, 80 Wn.App. at 227. The plaintiff need not show as part of the prima facie case “both that he was treated differently from a similarly situated and that the different treatment was based on” a prohibited characteristic because the different treatment creates an inference of intent. *Id.* at 227. The prima

facie case can be based on statistical evidence showing a pattern of discrimination, *Shannon*, 104 Wn2d at 735-6, *Pannell v. Food Services of America*, 61 Wn.App. 418, 433, 810 P.2d 952 (Div. I, 1991); *Stork v. International Bazaar, Inc.*, 54 Wn.App. 274, 278, 774 P.2d 22 (Div. I, 1984); or by evidence showing similar treatment of others in the protected class, *Burnside*, 123 Wn.2d at 107-8.

In the instant case, Appellant proved to the trial court that he was treated differently than Caucasian officers. Appellant provided examples of an officer who were charged with a DUI offense (Shaun Noble), an officer who reported to work under the influence of alcohol and an officer who used his badge during the course of an altercation. In the examples presented, none of the Caucasian officers were terminated despite using alcohol and being charged with a crime. Appellant, however, who was not charged with a crime was given exactly one option relative to his employment with Respondent-quit or be terminated from the employ of the City of Lakewood. Appellant was given no other alternative.

d The Employer's Rebuttal

The employer's burden is to produce admissible evidence of a legitimate, non-discriminatory reason for its action. *Xiang*, 120 Wn.2d at 519-22; *Bulaich v. A.T. &T. Info. Systems*, 113 Wn.2d 254, 259, 778 P.2d 1031 (1989). An employer's "(a)rticulation not admitted into evidence will

not suffice.” Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255 n.9, 101 S.Ct. 1089 (1981). After-acquired evidence of facts not known to the employer when its decision was made does not rebut the prima facie case, Hollingsworth v. Wash. Mutual Savings Bank, 37 Wn.App. 386, 394, 681 P.2d 845 (Div. I, 1984), though such evidence might be relevant to damages, Janson v. North Valley Hospital, 93 Wn.App 892, 900-3, 971 P.2d 67 (Div. III, 1999). The employer may argue an inference that there was no discriminatory motive where the “same actor is responsible for both the hiring and firing of a discrimination plaintiff and both actions occur within a short period of time...”. *Hill*, 144 Wn.2d at 189.

e. The Plaintiff's Showing of Pretext

In *Reeves*, the Supreme Court clarified the last stage of the *McDonnell Douglas* burden shifting scheme to hold that an employee who produces evidence of pretext is generally entitled to a jury trial on the merits unless his or her evidence is “weak.” *Reeves*, 530 U.S. at 143. In Washington, this has been interpreted to mean that for circumstantially-based discrimination claims under state law, a prima facie showing plus evidence sufficient to disbelieve the employer’s explanation will normally suffice to defeat summary judgment. *Renz*, 114 Wn.App. at 622, citing *Hill*, 144 Wn.2d at 185-6. A “suspicion of mendacity” on the part of the employer will suffice to put the case before the jury. *Hill*, 144 Wn.2d at

190 n. 14. One court has defined pretext as “a purpose or motive alleged or an appearance assumed in order to cloak the real intent or state of affairs,” thus, an employer’s good faith but mistaken belief as to the factual basis for termination does not amount to pretext. *Johnson*, 113 Wn.App. at 862 n.4. These are burdens of production, not of persuasion, because a jury trial is required for competing reasonable inferences from disputed evidence. Carle v. McChord Credit Union, 65 Wn.App. 93, 98-102, 827 P.2d 1070 (Div. II, 1992); *Renz, supra*. The plaintiff is not required to produce “direct or ‘smoking gun’ evidence.” Chen v. State, 86 Wn.App. 183, 190, 937 P.2d 612 (Div. II, 1997) (citing Sellsted v Wash. Mutual Sav. Bank, 69 Wn.App. 852, 860, 851 P.2d 716 (Div. I, 1993)).

V. Constructive discharge

A constructive discharge occurs “where an employer deliberately makes an employee’s working conditions intolerable, thereby forcing the employee to resign.” Sneed v. Barna, 80 Wash.App. 843, 849, (1996). Courts have applied this doctrine where an employer has allegedly engaged in illegal discrimination or retaliation for protected conduct. Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wash. App. 630, 632-33 1985). To establish constructive discharge, an employee must show that an employer engaged in a deliberate act, or a pattern of conduct, that made working conditions so intolerable that a reasonable person

would have felt compelled to resign. Sneed v. Barna, 80 Wash.App. 849-50. This is an objective standard and an "employee's subjective belief that he had no choice but to resign is irrelevant." Travis v. Tacoma Pub. Sch. Dist., 120 Wash.App. 542, 551, 85 P.3d 959 (2004).

Based upon the evidence presented, Celis complained of racial discrimination to Asst. Chief Zaro. Celis presented to either the Chief or Asst. Chief his concerns as to why he was passed over for promotion to sergeant. Specifically related to the complaints of racial animus, Celis witnessed first-hand Zaro's denial of even hearing Dan Tenney's statements. The racial components of this case coupled with the absence of any reasonable choice to "stand pat and fight" was destroyed by the Chief on November 1, 2010. The only reasonable action to take by Celis was to preserve his law enforcement commission. Had the LPD and the City of Lakewood taken official action to termination Celis' employment, they would have been required to report such termination under RCW 43.101.135. Such action would not only have terminated Appellant's position with Respondent, but his career in law enforcement would have ended. Thus, Appellant had no other choice.

Respondents raised the case of Molsness v. City of Walla Walla, 84 Wash. App. 393 (1996). In *Molsness*, the court stated that "the record evidence supports [a] finding that plaintiff chose to resign ... rather than

challenge the validity of her proposed discharge for cause. The fact remains, plaintiff had a choice.'" 84 Wash.App. at 398, (quoting Christie v. United States, 207 Ct.Cl. 333, 518 F.2d 584, 587-88 (1975)).

Molsness is distinguishable for a variety of reasons. While Molsness involved a civil service employee, Mr. John Molsness was not a police officer, rather a city engineer. More importantly, Mr. Molsness was asked to resign his position due to conflicts raised by his supervisor. Molsness, 84 Wash. App at 396. Specifically, Mr. Molsness was given a memorandum requesting his resignation prior to issuance of an annual performance evaluation. *Id.*

At no point was Appellant asked to resign his position. Evidence from Appellant clearly shows he was not given a choice in the matter giving rise to the claims in this case. He was also only given one day in which to resign or be fired for allegedly embarrassing the City of Lakewood Police Department. Under an objective standard, Appellant's resignation was not voluntary.

E. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court remand this matter to the trial court to allow Appellant to take his claims to trial against Respondents.

Dated this 29th day of December, 2014.

Respectfully submitted,

FAUBION, REEDER, FRALEY
& COOK, PS

By: 
Nelson C. Fraley, II, WSBA 26742
Attorney for Appellant

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DECLARATION OF SERVICE

STATE OF WASHINGTON

I certify under penalty of perjury that on the 29th day of December
2014, I served a copy of this BRIEF OF APPELLANT to the individuals

BY *C*
DEPUTY

and via the method(s) designated below:

Shannon M. Ragonesi, WSBA #31951 KEATING, BUCKLIN & MCCORMACK 800 Fifth Avenue, Suite 4141 Seattle, WA 98104 206-623-8861 – phone 206-223-9423 – fax sragonesi@kbmlawyers.com ,	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email Transmission
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Lona Hertz
Lona Hertz, Legal Assistant