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NO. 53484-3  
(Pierce County Superior Court No. 18-2-11246-5)

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

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NOUHOUM SIDIBE,

Plaintiff-Appellant,

v.

PIERCE COUNTY,

Defendant-Respondent.

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**PLAINTIFF-APPELLANT'S REPLY BRIEF**

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## **I. SUMMARY OF REPLY**

The County's response brief is based on an erroneous understanding of the Washington Law Against Discrimination (WLAD). The County acknowledges but then ignores the actual definition of adverse employment action, i.e. an action "that materially affects the terms, conditions or privileges of employment." Instead, the County focuses on a different definition, which limits adverse employment actions to those that are "more than an inconvenience or alteration of job responsibilities," such as actions that affect "workload or pay." This is not the law in Washington, and to adopt it would considerably narrow the application of the State's anti-discrimination laws.

Indeed, the County's proposed definition is not a definition at all but simply a set of guiding examples. These examples are not the law, they are comments taken from principally federal cases in the context of summary judgment. No Washington court has ever dismissed a case using this standard in the context of Wash. Civil Rule 12. And, while some state court cases do quote these phrases, they do not actually use them to dismiss cases as the County asks this Court to do. Instead, Washington courts consistently apply the materiality standard, under which Defendant's motion for judgment on the pleadings should have been denied.

The County’s reliance on federal cases, however misplaced, also supports reversal. Federal law differs from Washington law, which is to be liberally construed to protect employees, and therefore may serve as guidance, but is not binding on Washington courts. Even so, federal case law establishes a broad definition of adverse action—based on materiality—which supports Mr. Sidibe’s complaint. Thus, judgment on the pleadings should be reversed, and this case remanded for further proceedings.

## **II. ARGUMENT**

### **A. The County’s brief relies on a mistaken understanding of the law on discrimination in employment.**

#### **1. Washington law defines the element of “adverse action” to include any action that “materially affects the terms, conditions, or privileges of employment.”**

The County’s arguments in support of its motion to dismiss are premised on an inaccurate interpretation of what constitutes an adverse employment action. The law on adverse action is set forth in WPI 330.01.02, which provides that “[a]n adverse employment action is one that materially affects the terms, conditions or privileges of employment.” 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.01.02 (6th ed.). The County, however, relies on a more restrictive standard, asserting that an adverse action must be a “tangible” employment action such as hiring,

firing or failing to promote. *See* Resp. Brief at 6. This is not the law, And there is no question that if a jury was given this more restrictive instruction, it would be reversible error. Therefore, it cannot be an appropriate basis for dismissal on the pleadings. *See FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 869-870 (2013) (Washington has not adopted stricter federal pleading standards).

The County acknowledges, and then ignores, the actual legal standard for adverse action—materiality—knowing that it is a quintessentially factual and contextual standard which could never support dismissal on the pleadings. Materiality turns on specific facts and context and “an act that would be immaterial in some situations is material in others.” *Boyd v. State*, 187 Wn. App. 1, 13 (2015) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71-73 (2006)).

The County acknowledges that the bar for granting a motion to dismiss is exceedingly high, met “only if ‘it is beyond doubt that the plaintiff can prove no facts that would justify recovery, considering even hypothetical facts outside the record.’” Resp. Br. at 4 (quoting *In re Wash. Builders Benefit Trust*, 173 Wn. App. 34, 80, 293 P.3d 1206 (2013)). Under this standard, there is no question that Mr. Sidibe describes actions that state a claim. He claims Defendant singled him out for special

scrutiny because of his race, publicly accused him of being intoxicated at work, tested him repeatedly and, despite clear evidence of innocence, put him through a humiliating, months-long interrogation that is still ongoing and will be on his record indefinitely. He claims similarly situated white employees were not subject to any of this. In context, this disparate treatment easily could be found to have “materially affected the terms, conditions, or privileges” of his employment. Thus, the trial court should not have dismissed Plaintiff’s claim of discrimination, and its judgment should be reversed.

**2. The County relies on a different “definition” of adverse action, which is not a definition at all but simply a pair of contrasting examples.**

The County does not respond to this argument, nor to the fact that no Washington court has ever dismissed on the pleadings a claim of discrimination for failure to sufficiently allege adverse action. Instead, it notes that an adverse employment action must be “more than an inconvenience or alteration of one’s job responsibilities” such as a “reduction in an employee’s workload or pay.” See Resp. Brief at 6. However, this is not the law as set forth in the WPI. These statements do not provide a standard or a definition, but simply contrasting examples. The County has simply plucked them from cases, usually in the context of

summary judgment, never in the context of Rule 12, and never as a bright line rule to justify dismissal of a case before it is even heard.

Most important, while some of the state court cases quote this “mere inconvenience” language when discussing adverse action, none have actually applied it as a binding standard under the law. For example in *Boyd v. State*, the court noted that an adverse employment action may include “a demotion or adverse transfer, or a hostile work environment.” 187 Wn. App. 1, 11 (2015). However, the court applied the “materially adverse” standard, recognizing that “context matters.” *Id.* at 13 (“[A]n act that would be immaterial in some situations is material in others.”). In that case, the court deemed the employer’s actions, which were both disciplinary and investigatory in nature, sufficient to constitute adverse action. *Id.* at 14 (plaintiff had been suspended, reprimanded, and investigated).

Similarly, in *Alonso v. Qwest*, the court stated that “[a]n adverse employment action involves a change in employment conditions that is more than an inconvenience or alteration of one’s job responsibilities, such as reducing an employee’s workload and pay.” 178 Wn. App. 734, 746 (2013). The court also noted that a “demotion or an adverse transfer, or a hostile work environment, may also amount to an adverse employment action.” *Id.* However, Mr. Alonso had merely been

transferred to a new office, doing the same work for the same pay. *Id.* Alonso claimed he lost non-monetary benefits tied to his prior position, including “a newer van; cellular telephone; and preference in employer-supplied workstations, computers and desk telephones. *Id.* The court found “a reasonable juror could conclude” these constituted adverse action. *Id.* at 747. If deprivation of such “non-monetary” employment benefits can be adverse action, then so can the long, humiliating experience the Defendant put Plaintiff through here.

Plaintiff also pointed to two race discrimination cases involving adverse actions that did not affect the plaintiffs’ workload or pay, which Defendant completely failed to acknowledge or address in its Response. In *Davis v. W. One Auto Grp.*, 140 Wn. App. 449 (2007), the plaintiff was found to have sufficiently pled adverse employment actions claiming that his employer failed to recognize him in a local newspaper as employee of the month, refused him the company car of his choice, and subjected him to higher attendance scrutiny than his white colleagues. *Id.* at 459. These employer actions had no effect on Plaintiff’s workload or pay, but were sufficient to constitute adverse action.

In and *Blackburn v. Dep’t of Soc. & Health Servs.*, 186 Wn.2d 250 (2016), the Court determined the Defendant employer’s action was enough to be viewed as materially adverse, when it issued a single race based

staffing directive preventing African American employees from working over the course of a single weekend. *Id.* at 256. The Supreme Court determined that this was sufficient to constitute adverse action not because it affected the employees' workload or pay, but because it was deemed to have materially affected the "terms and conditions of employment because of ... race." *Id.* at 259.

The case law is clear that what constitutes a materially adverse employment action is not limited to actions that affect workload or pay. It turns on materiality and should be judged in context in each case. Thus, the decision of the trial court, premised on a different standard, should be reversed.

**B. The County's brief relies heavily on federal cases, which are not applicable, but which also support reversal.**

The County's formulation of what constitutes adverse action comes principally from federal cases, and our Supreme Court has frequently cautioned against blindly following federal anti-discrimination law in interpreting the WLAD. *See Blackburn*, 186 Wn.2d at 258 (internal quotations omitted):

We view Title VII cases as a source of guidance, but we also recognize that they are not binding and that we are free to adopt those theories and rationales which best further the purposes and mandates of our state statute.

Unlike Title VII, the WLAD contains a statutory mandate that its terms be liberally construed in favor of employees, and therefore “the WLAD provides greater employee protections than its federal counterparts do.” *See Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 491 (2014).

Even so, the federal cases do not support the County’s position. First, the County contends that the standard for establishing adverse action is higher in the context of race discrimination than in cases alleging retaliation for opposing such discrimination. See Resp. Brief at 8 n. 5. No Washington case says that a victim of alleged race discrimination should meet a higher standard than a victim of alleged retaliation, and our Supreme Court has made clear the purpose of the WLAD is to “eradicate discrimination in employment.” *Int’l Union of Operating Eng’rs, AFL-CIO, Local 286 v. Port of Seattle*, 176 Wn. 2d 712, 721 (2013) (the WLAD contains a “clear mandate to eliminate all forms of discrimination” and that the “purpose of the law is ‘to deter and to eradicate discrimination in Washington.’” (quoting *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359-60 (2001))).

Moreover, the difference in standards between discrimination and retaliation found in federal law is not significant here; as the United States Supreme Court explained in *Burlington Northern*, the distinction between adverse actions in the context of discrimination versus retaliation relates to

whether the adverse actions must be “related to employment or the workplace,” 548 U.S. at 61, or may include “actions not directly related to [plaintiff’s] employment or by causing him harm outside the workplace.” *Id.* at 63. This distinction is consistent with the nature and purpose of the two types of proscribed discrimination; anti-discrimination law is intended to secure equal *employment* opportunity for all, whereas anti-retaliation law seeks to protect employees from harm of *any kind* because of something they have done to advance equal employment opportunity. *Id.* Thus, at least under federal law, “the antiretaliation provision, unlike the substantive [discrimination] provision, is not limited to discriminatory actions that affect the terms and conditions of *employment*.” *Id.* at 64 (emphasis added).

That distinction does not matter here, because Plaintiff agrees (and Washington law provides) that he must show adverse *employment* action, i.e., action that “materially affect[ed] the terms, conditions, or privileges of [his] employment.” WPI 330.01.02. He alleges just that: he was singled out on the job, falsely and publicly accused of being intoxicated, repeatedly tested and then, despite the evidence exonerating him, subjected to an un-ending onerous interrogation and investigation involving many peers and superiors that will remain on his record and may affect his opportunities forever. These are all related directly to his work

and could be found to be “materially adverse” in the full context of the evidence that he could present at trial.

Curiously, the Defendant does not actually cite any cases concerning race discrimination, instead relying solely on cases involving retaliation and/or hostile work environment.<sup>1</sup> Yet, many such cases have expressly found discriminatory “investigations” against an employee to be sufficiently materially adverse to constitute “adverse employment action.”

For example, in *Velikonja v. Gonzales*, 466 F.3d 122 (D.C. Cir. 2006), a former FBI employee alleged he was subject to a lengthy investigation, was prevented from receiving promotions during the pendency of the investigation, and “a cloud [placed] over [her] career” preventing her from other career-enhancing opportunities for which she was qualified. *Id.* at 124. Similarly, in *Rattigan v. Holder*, 604 F. Supp. 2d 33, 54 (D.C. Cir. 2009), another FBI agent was subject to an investigation into allegations he posed a security risk. The Court held that an investigation into such serious allegations posed a serious threat to Plaintiff’s career, even if unsubstantiated, and that a jury could find that

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<sup>1</sup> See *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1113 (9th Cir. 2000); *Tange v. Home Depot*, 2011 U.S. Dist. LEXIS 144679 \*1, \*17 (W.D. Wash. 2011); *Ober v. Miller*, 2007 U.S. Dist. LEXIS 93236 \*35 (M.D. Penn 2011). Not a single case cited by Defendant involved race discrimination.

the investigation was “materially adverse.” *Id.*; see also *Walsh v. Irvin Stern’s Costumes*, 2006 U.S. Dist. LEXIS 57398, at \*2 (E.D. Pa. Aug 15, 2006) (“[A] threat to accuse [plaintiff] of a criminal offense could certainly be construed as ‘materially adverse’ to her.”).

In any event, it is clear from Washington cases such as *Blackburn*, *Davis*, *Alonso*, and *Boyd*, that Mr. Sidibe’s allegation of racially-motivated disparate treatment in the County’s baseless accusations, investigation, and report is sufficient to meet the standard of materiality to avoid dismissal. A jury could find that Mr. Sidibe, who was wrongfully accused of being drunk on the job, publically detained and disarmed in front of his peers, forced to submit to multiple PBT and Breathalyzer tests which confirmed his innocence, and then subjected to multiple interrogations for many months and told his cooperation would affect his promotional opportunities, was subject to action that was “materially adverse.”

### **III. CONCLUSION**

The County has misstated the applicable law under the WLAD and erroneously construed the standard for adverse employment action. Plaintiff has sufficiently pled facts that meet the materiality standard and give rise to an inference of adverse employment action, those facts are enough to withstand judgment on the pleadings. Thus, the trial court’s

judgment should be reversed, and the case remanded for further proceedings.

DATED: December 4, 2019

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the state of Washington that on this date I electronically filed the attached document with the Clerk of the Court and caused service of same on all counsel of record.

DATED this 4th day of December, 2019, at Seattle, Washington.

*s/Rachael Tamngin* \_\_\_\_\_  
Rachael Tamngin, Legal Assistant

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