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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

NOUHOUM SIDIBE,

Plaintiff-Appellant,

v.

PIERCE COUNTY,

Defendant-Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Plaintiff-Appellant Nouhoum Sidibe brought this race and national origin discrimination suit against his employer, Pierce County Sheriff's Department, after it publically accused him of being drunk on the job, repeatedly tested him and interrogated him for weeks in an "internal affairs investigation" that will remain on his employment record indefinitely, and deeply humiliated him in front of his peers and superiors. The Department's treatment of Mr. Sidibe contrasts sharply with its treatment of several white employees who were found to have *actually* been intoxicated at work. Nonetheless, the trial court granted Defendant's motion for judgment on the pleadings, relying solely on this Court's decision in *Kirby v. City of Tacoma*, 124 Wn. App. 454 (2004).

The trial court's order should be reversed. It misconstrued *Kirby* to hold that an internal affairs investigation, even if racially motivated, could *never* constitute an "adverse action" for the purposes of a disparate treatment claim under the Washington Law Against Discrimination (WLAD). Such a "bright line" categorical rule is contrary to the purpose and spirit of the WLAD and contrary to many other precedents of this and other courts, including our Supreme Court.

What constitutes an adverse action must be determined by a fact finder considering the "materiality" of the action, in the specific context of

each case. Judgment on the pleadings was wholly inappropriate here because a fact finder could easily conclude the Plaintiff's embarrassing, public, and racially-motivated accusation, interrogation, and investigation by Defendant – which will remain permanently on his personnel record – materially affected the terms and conditions of his employment. The trial court's judgment on the pleadings should be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Plaintiff's race and national origin discrimination claims, holding that under *Kirby v. City of Tacoma*, 124 Wn. App. 454 (2004), an internal affairs investigation, even if racially motivated, cannot constitute an adverse employment action, where it is clear that what qualifies as an adverse action is a question of fact, to be determined in context on a case-by-case basis.

III. STATEMENT OF THE CASE

Nouhoum Sidibe is a black American man, originally from Mali, West Africa. See Clerk's Papers ("CP") 41. The Pierce County Sheriff's Department hired Mr. Sidibe as a Corrections Deputy in 2014. CP 42. From the outset of his employment his goal was to advance to the position of Patrol Deputy. *See* CP 45.

A. Mr. Sidibe attends annual range certification and training without incident and receives the highest score in his cohort.

On March 13, 2018, Mr. Sidibe and a number of his colleagues reported to the Pierce County Shooting Range for firearms training and certification. CP 42. Mr. Sidibe was the only black person on the range that day. *Id.* The training began at 8:00 a.m. *Id.* Prior to taking the range that morning, the range instructors had advised all deputies to pick up their bullet casings after each round of shooting. *Id.* At around 12:30 p.m., after passing his certification with a 92% score, the highest score on the range that day, Mr. Sidibe took a break for lunch. *Id.* Just before breaking for lunch, Mr. Sidibe brought it to the attention of range instructor, Corrections Deputy Robert Miller, that many of the deputies had failed to pick up their casings. *Id.*

B. Late in the day the Sheriff accuses Mr. Sidibe of being intoxicated and forces him to submit to lengthy testing and interrogation.

Upon returning from lunch, Mr. Sidibe resumed shooting practice. CP 43. At 2:30 p.m., nearly two hours after the lunch break had passed and nearly seven hours into the training, Mr. Sidibe was told that Deputy Miller had smelled alcohol on his breath. *Id.* Mr. Sidibe was escorted off the range in front of his peers and ordered to submit to two portable breath tests (PBT).*Id.*

Both PBTs indicated “0.0,” confirming that Mr. Sidibe was not under the influence of alcohol. CP 43. Notwithstanding, Mr. Sidibe was disarmed, detained and transported to the Parkland Spanaway Precinct for additional breathalyzer testing. *Id.*

At the precinct, Mr. Sidibe was escorted through the facility in front of his peers and forced to submit to additional testing and interrogation. *Id.* He was told that refusal to submit to the testing would result in disciplinary action for insubordination. *Id.* Prior to administration of the test, Mr. Sidibe asked to use the restroom and was directed to use the detainee restroom, despite his status as a correctional officer. *Id.* He was observed from an open door while he used the restroom. *Id.*

C. Despite finding no evidence of intoxication, the Sheriff initiates an “internal affairs investigation.”

Two additional Breathalyzer tests confirmed what the earlier PBTs had indicated, that Mr. Sidibe was not under the influence of alcohol. CP 44. Both Breathalyzer tests registered Mr. Sidibe’s blood alcohol content as 0.0. *Id.*

Even then, Mr. Sidibe was not permitted to go back to work or home but was required to submit to an investigative interview. *Id.* Sheriff’s Department Internal Affairs officials, Detective Sergeant Teresa Berg and Detective Timothy Donlin, interrogated Mr. Sidibe regarding his

alcohol usage and off-duty activities in the hours preceding the range certification training. *Id.* Defendant had no policy against off-duty consumption of alcohol by deputies. *Id.*

Following the incident at the range, Mr. Sidibe's colleagues ridiculed him regarding the events that had taken place and the ongoing investigation, making comments like "drink, drink!" in passing and asking if he was drunk while at work. CP 45. This was very upsetting to Mr. Sidibe and he was forced to take time off and to switch from day shift to evening shift to avoid ridicule and embarrassment. CP 46.

On May 8, 2018, Detective Sergeant Berg issued an investigative report on behalf of the Internal Affairs Department. CP 44. It purported to conclude the Department's investigation regarding the incident that had taken place at the range on March 13. *Id.* However, the report contained several false and inaccurate characterizations of the events that had taken place that day. *Id.* Defendant gave Plaintiff 15 days to respond to the findings in its report. *Id.* On May 15, Mr. Sidibe submitted a written statement challenging the false and mistaken portions of the investigative report. *Id.*

Following submission of his rebuttal statement, Mr. Sidibe was ordered to submit to a second investigatory interview. CP 44. On May 21, 2018, Detective Sergeant Berg and Detective Donlin held a second

investigatory interview of Mr. Sidibe. *Id.* The interview did not focus on the allegations that Mr. Sidibe had been intoxicated while on duty. *Id.* Instead, Detective Sergeant Berg and Detective Donlin interrogated Mr. Sidibe regarding each and every contention in his written response to the investigative report. *Id.*

During the interview, Mr. Sidibe expressed his concern that the unfounded allegations against him would disrupt his chances at promotion to the position of Patrol Deputy. CP 45. Detective Sergeant Berg and Detective Donlin advised that Mr. Sidibe's cooperation with the investigation would be taken into consideration in any promotion decision. *Id.*

Despite the May 8 notice that the investigation had been concluded, Mr. Sidibe was also informed that the investigation was now ongoing. *Id.* The investigation will remain on Mr. Sidibe's personnel record indefinitely. *Id.* Mr. Sidibe sought to have the Department enter a finding of "Unfounded," which means the investigation found that the act or acts complained of did not occur or that the allegations are false. However, the Department issued a finding of "Not sustained," which means the investigation failed to discover sufficient evidence to prove or disprove the allegations against Plaintiff.

Mr. Sidibe has applied for promotion to Patrol Deputy but has not been successful.

D. Mr. Sidibe sues and the trial court dismisses his case on the pleadings.

Mr. Sidibe filed a complaint under the Washington Law Against Discrimination (WLAD) alleging that the Sheriff's Department had discriminated against him, publically and wrongfully accusing him of on-the-job intoxication, and subjecting him to an ongoing internal affairs investigation in retaliation for his filing a rebuttal statement in which he challenged the Department's characterization of events. CP 21. Mr. Sidibe filed a Second Amended Complaint in which he alleged both race and national origin played a substantial factor in Defendant's unfounded allegations and investigative actions. CP 18. He also added a hostile work environment claim and a discriminatory failure to promote claim. *Id.*

Pierce County moved for judgment on the pleadings, arguing in relevant part that Mr. Sidibe could not establish a prima facie case of discrimination because an internal affairs investigation cannot constitute an "adverse employment action." CP 1-2. In making its argument, the County argued that this Court's holding in *Kirby v. City of Tacoma* held categorically that an internal investigation cannot constitute an adverse action. CP 6.

At a hearing on March 29, 2019, the trial court granted the County's motion for judgment on the pleadings with respect to Plaintiff's disparate treatment claims. CP 39-40. Shortly thereafter, the parties filed a Stipulation of Dismissal Without Prejudice concerning Plaintiff's claims for retaliation and hostile work environment. CP 50-51.¹ This timely appeal followed.

IV. ARGUMENT

A. Standard of review

Review of a trial court's decision under CR 12(c) is de novo. *Didlake v. State*, 186 Wn. App. 417, 422 (2015). The Court "must assume the truth of the facts alleged in the complaint, as well as any hypothetical facts" in favor of the plaintiff. *Id.* Judgment on the pleadings is appropriate only if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." *Id.* In the face of "competing reasonable inferences," factual questions are to be decided by a jury. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 622 (2002).

¹ Plaintiff filed a Third Amended Complaint for the sole purpose of correcting the named Defendant to this action. CP 41-49.

B. The trial court erred in ordering partial dismissal of Plaintiff's disparate treatment claim.

1. The Washington law against discrimination is to be liberally construed.

“The purpose of Washington’s Law Against Discrimination (WLAD), chapter 49.60 RCW, is to eliminate and prevent discrimination in the workplace.” *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 441 (2014). The statute was passed by the legislature finding that discrimination “threatens not only the rights and proper privileges of [Washington’s] inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. The WLAD is to be “construed liberally” to accomplish its antidiscrimination purposes. *Blackburn v. Dep’t of Soc. & Health Servs.*, 186 Wn. 2d 250, 257 (2016); RCW 49.60.020. Accordingly, Washington courts should liberally construe what constitutes an adverse employment action for the purposes of a disparate treatment claim.

2. Whether an employer’s actions against an employee constitutes “adverse employment action” depends on context and materiality, which should be determined by a jury.

An employee claiming disparate treatment discrimination must prove (1) he was qualified for the position and doing satisfactory work; (2) he belongs to a protected class; (3) he was subjected to an adverse employment action; and (4) was treated less favorably than a similarly

situated non protected employee. *Milligan v. Thompson*, 110 Wn. App. 628, 637 (2002). The County challenged only the third element – whether Plaintiff was subjected to an adverse action. An adverse action is defined as “one that materially affects the terms, conditions or privileges of employment.” WPI 330.01.02. “[W]hether a particular action would be viewed as adverse by a reasonable employee is a question of fact appropriate for a jury.” *Boyd v. State*, 187 Wn. App. 1, 14 (2015); *see also Burlington N. & Santa Fe Ry. V. White*, 548 U.S. 53, 71 (2006) (Whether a particular employment action will qualify as “materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff’s position.”). Context matters when determining materiality of an adverse action. “[A] legal standard that speaks in general terms rather than specific prohibited acts is preferable [where an] ‘act that would be immaterial in some situations is material in others.’” *Burlington*, 548 U.S. at 69 (quoting *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005)).

Consistent with this contextual approach, Washington courts have acknowledged that what constitutes an adverse action is not subject to bright line rules. Comments WPI 330.01.02 (“The distinction between an adverse employment action and a mere ‘inconvenience’ or ‘alteration of one’s job responsibilities’ is not a bright line.”). However, here, the trial

court did just that: it drew a bright line, holding that an internal affairs investigation can never constitute an adverse action.

Washington courts have accepted a broad array of employment actions as sufficient to qualify as adverse. In *Blackburn v. Dep't of Soc. & Health Servs.*, 186 Wn.2d 250, 254 (2016), employees challenged Western State Hospital's staffing directive preventing African-American employees from working over the course of a single weekend. The trial court rejected the employees' disparate treatment claim concluding that they had failed to prove a tangible adverse employment action that was severe enough to be actionable. *Id.* at 256. On appeal, the Washington Supreme Court disagreed, determining that an employer's race based staffing directive was sufficient to constitute discrimination in the "terms or conditions of employment because ... of race." *Id.* at 259.

In *Boyd v. State*, 187 Wn. App. 1 (2015), an employee alleged he had been subject to several adverse employment actions, including an internal investigation by his employer. The employer argued that the plaintiff had failed to establish an adverse employment action, defending its actions as "legitimate business decisions that were disciplinary or investigatory in nature." *Id.* at 14. (internal quotations omitted). The court noted that "whether a particular action would be viewed as adverse by a reasonable employee is a question of fact appropriate for a jury." *Id.* Thus,

the court held that “the trial court had correctly declined to determine as a matter of law that [the employer’s] actions were not adverse employment actions.” *Id.* at 13.

In *Davis v. W. One Auto Grp.*, 140 Wn. App. 449 (2007), an African-American man alleged as adverse employment actions that his employer had (1) failed to recognize him in a local newspaper as employee of the month, (2) refused to allow him to drive the company car of his choice, and (3) held him to a higher attendance standard than his white co-workers. *Id.* at 459. Division Three reversed summary judgment in favor of the employer because the evidence contained reasonable but competing evidence of both discrimination and nondiscrimination, presenting questions of fact for a jury. *Id.*

Alonso v. Qwest Commc 'ns Co., LLC, 178 Wn. App. 734 (2013), is yet another example in which the court determined that a jury, viewing the facts in the light most favorable to plaintiff, could find adverse employment actions. *Id.* at 747. In *Alonso*, plaintiff alleged that his work van, cell phone, and employer-supplied workstations, computers, and desk phones were “benefits,” the loss of which constituted adverse employment action. *Id.* at 746. The court agreed that a reasonable juror could conclude that plaintiff, when forced to relinquish these benefits, suffered adverse action. *Id.* at 747.

The cases above show that courts generally decline to determine as a matter of law whether complained of employment actions are “materially adverse” sufficient to constitute adverse action. The trial court’s judgment on the pleadings is contrary to this substantial precedent and the liberal interpretive standard that applies to the WLAD, and should be reversed.

3. *Kirby* does not preclude a trial court from holding that an internal affairs investigation constitutes an adverse employment action.

Defendant’s contention that *Kirby* establishes as a categorical rule or “bright line” that an internal affairs investigation can under no circumstances constitute an adverse employment action is wrong. This Court’s holding in *Kirby* was not a categorical ruling on the categories of conduct that fall within the realm of adverse action. Instead, *Kirby* was decided on the basis of plaintiff’s inability to provide factual evidence of discriminatory intent. 124 Wn. App. at 463.

In *Kirby*, plaintiff alleged he had been subject to several internal affairs investigations due to his union activities, his disability, and his age. 124 Wn. App. 454 (2004). In fact, the employer had initiated its internal investigations in direct response to plaintiff’s open opposition to the institution’s command structure and routine resistance to his superior’s directives. *Id.* at 460-461. The Court determined that the complained of

conduct was factually insufficient to rise to the level of adverse action, where there was no evidence of discrimination, the employers actions were motivated by plaintiff's insubordination, and the employer's conduct was only disciplinary and investigatory in nature. *Id.* at 465. While it is true the Court stated adverse actions "must involve a change in employment conditions that is more than an 'inconvenience' or 'alterations of job responsibilities,'" it also confirmed that "[c]ourts have loosely defined 'adverse employment action.'" *Id.*² It did not hold that an internal affairs investigation cannot ever constitute an adverse employment action.

Unlike plaintiff in *Kirby*, Mr. Sidibe had no history of insubordination or misconduct. He was publically singled out and wrongfully accused of on-the-job intoxication and subjected to an unjustified, hostile, and drawn out investigation. The investigation will remain on his employment record indefinitely, and as admitted by Detective Sergeant Berg and Detective Donlin, will likely affect internal promotion opportunities. CP 45. The investigative files are now subject to public record, also having a potential effect on external employment opportunities. Further, the investigation caused Plaintiff such distress that

² As discussed below, the "mere inconvenience" test comes from federal cases and is not consistent with the standard applied in Washington.

he took several days of sick leave and transferred shifts to avoid continued ridicule from his colleagues.

Viewed in the light most favorable to Mr. Sidibe, a jury could easily find that Defendant's investigation "materially [affected] the terms, conditions, or privileges" of his employment. WPI 330.01.02. Thus, he has alleged facts that could lead the fact finder to conclude that the aggressive and ongoing nature of Defendant's investigation comprised an adverse action.

4. To the extent *Kirby* establishes that internal affairs investigations cannot constitute adverse employment actions, the Court should overrule it.

If *Kirby* establishes a categorical rule that an internal affairs investigation, even if racially motivated, cannot constitute an adverse employment action, it is wrong. Such a blanket prohibition is contrary to the purposes of the WLAD, which is to be liberally construed "to protect individuals from discrimination on the basis of race." *Blackburn*, 186 Wn.2d at 257; *See Scrivener v. Clark Coll.*, 181Wn.2d 439, 441 (2014).

Washington courts have consistently applied a flexible definition to "adverse employment action," eschewing any "bright line." If this Court drew a bright line in *Kirby* then *Kirby* should be reversed.

As noted above, *Kirby* relied on a different, more stringent standard used in federal decisions. *Kirby*, 124 Wn. App. at 465. In

addition to the “materially adverse” action standard adopted in Washington, *Kirby* appeared to also apply a “mere inconvenience” standard to the question of adverse action. This standard relates to claims of retaliation and hostile work environment under Title VII, which require that an actionable adverse employment action involve a tangible impact on an employee’s workload and/or pay. *Kirby*, 124 Wn. App. at 465. However, this definition fails to fulfill the broad liberal approach taken under the WLAD. The Washington Supreme Court has noted that while Washington courts view federal cases on Title VII as a source of guidance, they are not binding, Washington courts “are free to adopt those theories and rationales which best further the purposes of our state statute.” *Blackburn*, 186 Wn.2d at 258.

As indicated by the cases cited above, Washington Courts have found a variety of employer actions, which appear to be much less impactful than those alleged by Mr. Sidibe, sufficient to qualify as adverse actions. Any action that materially affects the terms and conditions of employment has been found sufficient to constitute an adverse action. This can be seen in *Blackburn*, where an employer’s race based directive was sufficient to be deemed an adverse action; in *Boyd*, where the court determined an internal investigation could in fact be an adverse action; in *Davis*, where failure to adequately recognize an employee was enough to

be an adverse action; and in *Alonso*, where removal of workplace privileges and benefits were adequate to rise to the level of “materially adverse.”

Mr. Sidibe’s allegations regarding Defendant’s racially-motivated investigation are at least as significant as the action alleged in the cases cited above. None of the alleged employer actions in those cases involved a direct impact to the employee’s workload or pay, and yet the courts determined that the actions were sufficiently and materially adverse. Similarly, while Mr. Sidibe experienced no immediate impact to his workload or pay, he endured a persistent, unwarranted, and allegedly racist investigatory pursuit for over a year, which humiliated him in front of his peers and will likely impact his future job opportunities indefinitely.

If this Court’s ruling in *Kirby* establishes a bright line rule that internal affairs investigations cannot constitute adverse employment actions, the Court should reconsider and overrule it.

5. Mr. Sidibe alleged other adverse treatment is sufficient to overcome a motion for judgment on the pleadings.

Even if *Kirby*’s statement of the law on adverse action is categorical and the Court determines that an internal affairs investigation cannot constitute an adverse action, Mr. Sidibe alleged other adverse treatment sufficient to overcome a motion for judgment on the pleadings.

Mr. Sidibe alleged that his race and national origin played a substantial factor in the string of events that took place prior to Defendant's initiation of its internal affairs investigation.

Mr. Sidibe asserted that Defendant's wrongful accusation that he was drunk on the job, his public detention and disarmament, and being forced to submit to multiple PBT and Breathalyzer tests by his superiors in front of his peers, were tangible employment actions in which he was treated less favorably in the terms and/or conditions of his employment, than white coworkers under similar circumstances. The trial court determined that these actions were all encompassed in Defendant's internal investigation and thus categorically insufficient to allege adverse action under *Kirby*. Whether these other actions were sufficient individually or collectively to constitute adverse employment actions is a factual question for a jury. *See Boyd*, 187, Wn. App. 1, 14 ("We express no opinion as to whether these employment actions, taken individually, constituted adverse employment actions as a matter of law. However, taken in context, a reasonable jury could find that these actions, taken together, were materially adverse."). Thus, the trial court should not have dismissed Plaintiff's claim of discrimination, and its judgment should be reversed.

V. CONCLUSION

Judgment on the pleadings was inappropriate in this case. In employment discrimination cases, there are often reasonable but competing inferences of both discrimination and nondiscrimination, making these cases suitable for a jury. The facts here certainly support an inference that Defendant's conduct was "materially adverse" to Mr. Sidibe. Thus, judgment on the pleadings should not have been granted.

DATED: September 19, 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 using the Washington State Appellate Courts' Portal and caused service of same on all counsel of record.

DATED September 19, 2019, at Seattle, Washington.

s/ Nerissa Tigner
Nerissa Tigner, Paralegal

BRESKIN JOHNSON TOWNSEND PLLC

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