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

NOUHOUM SIDIBE, Appellant,

v.

PIERCE COUNTY, Respondent

RESPONDENT'S CORRECTED ANSWERING BRIEF

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**I. ISSUES PERTAINING TO APPELLANT'S
ASSIGNMENTS OF ERROR**

Did the trial court properly dismiss Plaintiff's claim of disparate treatment where Plaintiff could not prove under any set of facts that he was subjected to an adverse employment action?

II. STATEMENT OF THE CASE

A. PROCEDURE

On September 10, 2018, Plaintiff Nouhoum Sidibe filed a lawsuit against Pierce County claiming race discrimination based on disparate treatment under the Washington Law Against Discrimination (WLAD). CP 81-86. On February 5, 2019, Plaintiff filed an Amended Complaint adding a claim of retaliation. CP 87-95.

On March 12, 2019, Defendant Pierce County filed a partial Motion for Judgment on the Pleadings Pursuant to CR 12(c) on the basis that Plaintiff's disparate treatment claim failed as a matter of law because Plaintiff could not establish under *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004), that his involvement in an internal investigation constituted an adverse employment action. CP 1-11.

On March 22, 2019, Plaintiff filed a Second Amended Complaint adding claims of hostile work environment and harassment and alleging discrimination based on both race and national origin. CP 12-20.

The parties appeared before the Honorable Judge S. Serko on March 29, 2019, to be heard on Pierce County's Partial Motion for Judgment on the Pleadings. CP 37-38; RP 1-19. The court granted Defendant's motion and dismissed the disparate treatment claim. CP 39-40; RP 10.

On April 22, 2019, the Court granted Plaintiff's stipulated motion for dismissal of the remaining claims. CP 50-51. On this same day, Plaintiff filed a Third Amended Complaint, substituting Pierce County for the Pierce County Sheriff's Department as the named Defendant. CP 41-49.

This timely appeal follows. CP 52-54.

B. FACTS

The following facts are taken from Plaintiff's Third Amended Complaint:

Plaintiff Nouhoum Sidibe is a black-American male who has been employed as a Corrections Deputy with the Pierce County Sheriff's Department (PCSD) since 2014. CP 41-49. On March 13, 2018, Sidibe attended an annual training weapon certification at the PCSD Shooting

Range. *Id.* Sidibe was the only black person on the range that day. *Id.* The training began at 8 a.m. *Id.* Prior to taking the range, the instructors advised all deputies to pick up their bullet casings after each round of shooting. *Id.* Sidibe passed his certification with a 92 percent score. *Id.* At around 12:30 p.m., Sidibe brought it to the attention of the range instructor, Corrections Deputy Robert Miller, that many of the deputies had failed to pick up their casings. *Id.* Sidibe then left the range for lunch. *Id.* Upon his return, Sidibe resumed shooting practice. *Id.* At approximately 2:30 p.m., Sidibe was told that Corrections Deputy Miller reported smelling alcohol on Sidibe's breath. *Id.* Sidibe was escorted off the range and ordered to submit to two portable breath tests (PBT), the results of which were both 0.0. *Id.* Sidibe was ordered to place his gun in his vehicle and was then transported to the Parkland Precinct for administration of a breathalyzer test, the result of which was 0.0. *Id.* Internal Affairs (IA) investigators Teresa Berg and Timothy Donlin responded to the Parkland Precinct and interviewed Sidibe regarding his alcohol usage and activities in the hours preceding the range certification training. *Id.* On May 8, 2018, IA issues an investigative report of the events. *Id.* On May 15, 2018, Sidibe submitted a written statement rebutting several portions of the investigative report. *Id.* On May 21, 2018, IA investigators Berg and Donlin held a second investigatory

interview of Sidibe, where they questioned Sidibe about his rebuttal statement. *Id.* During the interview, Sidibe expressed concern that the unfounded allegations against him would disrupt his chances at promotion to patrol deputy. *Id.* IA opened a formal investigation into the allegations. *Id.* The IA investigation is pending a final determination. *Id.*

III. ARGUMENT

A. STANDARD OF REVIEW

An appellate court reviews a CR 12(c) dismissal on the pleadings de novo. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). A dismissal under CR 12(c) is appropriate only if "it is beyond doubt that the plaintiff can prove no facts that would justify recovery, considering even hypothetical facts outside the record." *In re Wash. Builders Benefit Trust*, 173 Wn.App. 34, 80, 293 P.3d 1206, review denied, 177 Wn.2d 1018 (2013). "Like a CR 12(b)(6) motion, the purpose [of a CR 12(c) motion] is to determine if a plaintiff can prove any set of facts that would justify relief." *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). As is the case with a CR 12(b)(6) motion, the court takes "the facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party." *Davenport v. Wash. Educ. Ass'n*, 147 Wn.App. 704, 715, 197 P.3d 686 (2008).

B. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S DISPARATE TREATMENT CLAIM BECAUSE HE COULD NOT PROVE UNDER ANY SET OF FACTS THAT HE WAS SUBJECTED TO AN ADVERSE EMPLOYMENT ACTION

For claims alleging disparate treatment under Washington's Law Against Discrimination, RCW 49.60.010, *et seq.*, a plaintiff must make a prima facie case of discrimination by showing that he: (1) was qualified for the position and doing satisfactory work; (2) is a member of a protected class; (3) was subjected to an adverse employment action; and (4) was treated less favorably than similarly situated individuals who are not members of the protected class. *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002); *McDonnell Douglas Corp.*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If the employee cannot establish all of the elements of a prima facie case, then the employer is entitled to judgment as a matter of law. *Kirby*, 124 Wn. App. 124 Wn. App. 454, 464, 98 P.3d 827 (2004).

An adverse employment action is a tangible employment decision that is objectively and materially adverse. *See Boyd v. State, Dep't of Soc. & Health Servs.*, 187 Wn. App. 1, 13, 349 P.3d 864 (2015); *see, also*, WPI 330.01.02 (adverse employment action is one that materially affects the terms, conditions, or privileges of employment). To be actionable, an adverse employment action must involve a change in employment

conditions that is more than an inconvenience or alteration of job responsibilities – it must be something substantial, such as a reduction in an employee's workload or pay. *Alonso v. Qwest Communication Co., LLC*, 178 Wn. App. 734, 746, 315 P.3d 610 (2013); *Campbell v. State*, 129 Wn. App. 10, 22, 118 P.3d 888 (2005); *Crownover v. State ex rel. Dept. of Transp.*, 165 Wn. App. 131, 148, 265 P.3d 971 (2011) (an adverse employment action must be a "tangible change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"); *Kirby*, 124 Wn. App. at 465; *see, also, Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1113 (9th Cir.2000) ("A tangible employment action in most cases inflicts direct economic harm.").¹ In contrast, yelling at an employee or threatening to fire an employee is not an adverse employment action. *See Munday v. Waste Mgmt. of N. Am. Inc.*, 126 F.3d 239, 243 (4th Cir.1997); *see, also, Tyner v. State*, 137 Wn. App. 545, 154 P.3d 920 (2007) (transfer to alternate work site was not an adverse employment action); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S.

¹ Although many of the cases analyzing what constitutes an adverse employment action involve a Title VII claim rather than a WLAD claim, the adverse employment action requirement is the same under both. *Ellorin v. Applied Finishing, Inc.*, 996 F. Supp. 2d 1070, 1089 (W.D. Wash. 2014). Washington courts commonly "look to Title VII case law for instruction or persuasive authority in construing WLAD." *Id.* at 1081; *Alonso v. Qwest Communications Co., LLC*, 178 Wn. App. at 744, fn 11 ("Because our discrimination laws substantially parallel Title VII of the Civil Rights Act of 1964, we may look to federal law for guidance.").

53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) ("Personality conflicts at work that generate antipathy and snubbing by supervisors and co-workers are not actionable.").

While Plaintiff is correct that the adverse action inquiry is context-specific, it is well-settled in Washington that events that are disciplinary or investigatory in nature and that do not materially affect the terms and conditions of employment are not adverse employment actions.² *Kirby*, 124 Wn. App. at 465.

In *Kirby*, the plaintiff, a police officer, was subject to multiple internal affairs investigations during his employment. *Id.* He alleged numerous adverse actions in support of his retaliation claim, including the investigations themselves. *Id.* The defendant conceded that a failure to promote was an adverse employment action but disputed the other allegations. *Id.* The court held that, "The other alleged events, however, were disciplinary or investigatory in nature and, therefore, do not constitute adverse employment actions under the cases cited above. *At*

² Contrary to Plaintiff's claim, Defendant is not asserting that *Kirby* creates a categorical rule that an internal affairs investigation can never amount to an adverse employment action. *See* Brief of Appellant, at 13. The *Kirby* holding does not create such a bright-line rule; rather, *Kirby* holds that courts must consider the *impact* of the investigation on the employee's workload and pay in order to make this determination. Where there is no tangible impact on an employee's workload or pay as a result of the investigation, there is no adverse employment action. Because *Kirby* does not establish such a categorical rule, it does not need to be overruled.

most, these events were inconveniences that did not have a tangible impact on Kirby's workload or pay." *Id.* (emphasis added).

Federal caselaw is in accord with the *Kirby* holding.³ In *Brown v. Mills*, an employee alleged that her employer's internal investigation "cast ... a shadow" on her and that other employees were "reluctant to work with her and stayed away from her" because she was the subject of an internal investigation by the Office of Inspector General for allegations of failing to follow security protocols and being suspected of other conflict of interest conduct. *Brown v. Mills*, 674 F.Supp.2d 182, 191 (D.D.C. 2009). The court held that the allegations about the investigation were not materially adverse because they would not dissuade a reasonable employee from complaining of discrimination. *Id.* at 191. *See, also, Tange v. Home Depot*, C10-1286-JCC, 011 6258457, at *6 (W.D. Wash. Dec. 15, 2011) (investigation of plaintiff was not adverse action).⁴

³ Washington courts look to federal antidiscrimination law to construe the WLAD and are "free to adopt those theories" that further the purposes of the state statute. *Kumar v. Gate Gourmet Inc.*, 180 Wash.2d 481, 491, 325 P.3d 193 (2014) (quoting *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 361–62, 753 P.2d 517 (1988)); *Oliver v. Pacific Northwest Bell Tel. Co.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986) ("RCW 49.60 is patterned after Title 7 of the Civil Rights Act of 1964 Consequently, decisions interpreting the federal act are persuasive authority for the construction of RCW 49.60.").

⁴ Courts have recognized that both retaliation and discrimination claims require a showing of an "adverse employment action," but that the standards are not identical. "[T]he standard in the discrimination context is more stringent than in the retaliation context." *Herbert v. Architect of Capitol*, 766 F.Supp.2d 59, 80 (2011) (citing *Baloch v. Kempthorne*, 550 F.3d 1191, 1198 n.4 (D.C.Cir.2008) ("'Adverse actions' in the retaliation context encompass a broader sweep of actions than those in a pure discrimination claim.")). As such, if IA investigations are not sufficiently adverse under

In another case where an employee alleged that he was the "target" of an internal investigation that was never concluded because he believed his employer was "concealing" evidence of discrimination, a federal district court held that these allegations did not constitute a materially adverse employment action because the employee was unable to show that the flawed investigation negatively impacted his employment in a meaningful manner. *Herbert*, 766 F.Supp.2d at 79 (employee could not establish that flawed internal investigation created a materially adverse employment action even assuming that the employee was the "target" of the investigation); *see, also, Ober v. Miller*, 2007 WL 4443256, 10 (M.D. Pa. 2007) (even assuming procedural flaws in the internal investigation, there was no First Amendment retaliation because "none of the procedural errors would be sufficient to deter" a person from engaging in their first amendment rights, and plaintiff could not establish that any meaningful "adverse effect" resulted from the flawed investigation); *Lewis v. State of Connecticut Dep't of Corr.*, 355 F.Supp.2d 607, 619 (D.Conn. 2005).

Like *Kirby*, the Plaintiff in this case did not prove, nor could he, a tangible impact on his workload or pay as a result of the Department's investigation into his suspected on-the-job intoxication because the investigation is still pending and has not resulted in a final disciplinary

the more liberal retaliation rubric, a discrimination claim based on an IA investigation fails *ipso facto*. *See Herbert*, 766 F.Supp.2d at 80.

decision.⁵ The trial court properly found that these facts were insufficient to constitute an adverse employment action under *Kirby* and properly dismissed the disparate treatment claim.

Plaintiff erroneously claims on appeal that the trial court interpreted *Kirby* as establishing a bright-line rule that an internal affairs investigation can never constitute an adverse employment action. Brief of Appellant at 11. Neither the court's verbal ruling nor written order support this. *See* CP 39-40; RP 10. Further, even if the trial court had misconstrued the *Kirby* holding to mean that an IA investigation could never be an adverse employment action, the court's dismissal should still be affirmed because Plaintiff did not suffer an adverse employment action under a correct reading of *Kirby*. An appellate court can affirm the trial

⁵ Various district courts have recognized that steps or recommendations that are part of the disciplinary process, but that do not constitute the final disciplinary decision do not amount to an adverse employment action. *Krane v. Capital One Services, Inc.*, 314 F.Supp.2d 589, 611 (E.D.Va.2004)); *Weisbecker v. Sayville Union Free School Dist.*, 890 F. Supp.2d 215 (E.D. NY, 2012). The initiation of a police internal affairs investigation is not an adverse employment action. *McInnis v. Town of Weston*, 375 F.Supp.2d 70, 84, 85 (D.Conn.2005). Moreover, when the disciplinary process includes a final disposition before a hearing board, the recommendation for termination during that process is not an adverse employment action because it is not a final decision. *See Greene v. Brentwood Union Free School Dist.*, 966 F.Supp.2d 131 (E.D. NY, 2013); *Adkins v. Fairfax County School Bd.*, 2008 WL 2076654 (E.D. VA, 2008) (unpublished) ("the alleged adverse action from November 2005 – a recommendation from the Director for the Office of Employee Performance for the School Board to the Superintendent of the School Board that Plaintiff be terminated – does not qualify as an adverse employment action"); *Watson v. Gutierrez*, 2006 WL 1647116, at *5 (E.D. Va., June 6, 2006) (unpublished) (holding that the recommendation of termination does not qualify as an adverse employment action); *Stevens v. Water District*, 561 F.Supp.2d 1224, at fn 66 (D. Kan 2008) (The definition of adverse employment action does not "extend to a mere recommendation of termination or other discipline.").

court's rulings on any grounds the record and the law support. *Swinehart v. City of Spokane*, 145 Wn.App. 836, 844, 187 P.3d 345 (2008). Plaintiff did not – and cannot – establish that the IA investigation here had any tangible impact on Plaintiff's employment. Such a showing is required under *Kirby*. As such, the facts support the trial court's determination that Plaintiff did not establish an adverse employment action.

Plaintiff's claim that the investigation *itself* is the adverse impact is also foreclosed by *Kirby* and the federal case law set forth above. Plaintiff cites to this Court's decision in *Boyd v. State, Dep't of Soc. & Health Servs.*, 187 Wn. App. 1, 13, 349 P.3d 864 (2015), to support his claim that the treatment he received throughout the internal investigation, including the investigation itself, amounted to an adverse employment action.

Plaintiff's reliance on *Boyd* is misplaced. In *Boyd*, the plaintiff, a nurse at Washington State Hospital (WSH), presented evidence that WSH investigated him for misconduct and suspended him without pay, issued a written reprimand that was disseminated to his supervisor, removed him from his ward and from patient interaction, and reported him to both the Department of Health and the police. *Boyd*, 187 Wn. App. at 14. This court rejected WSH's claim that, as a matter of law, some of these acts were not adverse because they were "legitimate business decisions" that were disciplinary or investigatory in nature. *Id.* The court stated, "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." *Id.* Here, Plaintiff provided no such context for his claims. Plaintiff has not been reprimanded, suspended, nor demoted. Indeed, he has not suffered any disciplinary action at all,⁶ and his self-proclaimed embarrassment over being the subject of an investigation does not meet the criteria for an adverse employment action. An employee's idiosyncratic preferences or "subjective, 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.). And "not everything that makes an employee unhappy is an actionable adverse action." *Alonso*, 178 Wn. App. at 747 (*quoting Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996)); *see, also, Blackie v. State of Me.*, 75 F.3d 716, 725 (1st Cir. 1996) ("Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate

⁶ Plaintiff includes in his appellate brief facts relating to the Department's investigatory findings that were not before the trial court at the time of Defendant's 12(c) motion. *See* Brief of Appellant, at 6-7. Plaintiff fails to include citations to the record for these factual statements, as required by RAP 10.3(a)(5). These facts should be disregarded as they were not before the trial court at the time of the motion and are presented for the first time in Plaintiff's appellate brief. *See* RAP 2.5(a). Furthermore, Plaintiff's claim that the investigation itself may impact future employment opportunities is nothing more than speculation and conjecture; it certainly doesn't establish an adverse employment action. *See* Brief of Appellant at 14.

that act or omission to the level of a materially adverse employment action.").

The requirement of an adverse employment action plays a critical gatekeeping role in antidiscrimination law. As one court explained, the adverse action requirement helps avoid "judicial micromanagement of business practices by second-guessing employers' decisions" about everyday workplace issues, such as "which of several qualified employees will work on a particular assignment." *Baloch v. Kempthorne*, 550 F.3d 1191, 1197 (D.C. Cir. 2008) (internal quotation marks and citation omitted). The WLAD is not a "general civility code." *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297, 57 P.3d 280 (2002) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998)). And a court is not a "super-personnel department" to "oversee a company's general employment practices," adjudicate "garden-variety complaints about minor slights and disagreements with supervisors," and "guarantee each employee a genial boss." *Lisdahl v. Mayo Found.*, 633 F.3d 712, 722 (8th Cir. 2011); accord *White v. State*, 131 Wn.2d 1, 19-20, 929 P.2d 396 (1997). The adverse action requirement is no mere technical formalism, but rather an "essential element" of any discrimination claim premised on disparate treatment. *Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1228-29 (10th Cir. 2004). If the employee fails to establish this element of his

prima facie case, then the employer is entitled to judgment as a matter of law. *Kirby*, 124 Wn. App. at 464. Public policy demands that employers must be able to initiate investigations into allegations of employee misconduct without fear of liability. An employee who is the subject of these investigations has several avenues of recourse if the investigation is handled in a discriminatory manner; for example, they may bring a hostile work environment or emotional distress claim. If the investigation results in action that has an impact on an employee's workload or pay, he or she is entitled to bring a disparate treatment claim. But the investigation *by itself* is insufficient to establish the requisite elements of a disparate treatment claim.⁷

Here, Plaintiff's disparate treatment claim relies solely on Defendant's investigation into Plaintiff's suspected on-the-job intoxication as the adverse employment action. As set forth above, a pending internal investigation without proof of a tangible impact on workload or pay is not an adverse employment action under the law. The trial court properly dismissed Plaintiff's claim of disparate treatment.

⁷ This is true *even if* the investigation reveals that the accusation was wrong. *See, e.g., Herbert v. Architect of Capitol*, 766 F.Supp.2d 59, 79 (2011); *Ober v. Miller*, 2007 WL 4443256, 10 (M.D. Pa. 2007).

IV. CONCLUSION

For the foregoing reasons, Defendant requests this Court affirm the trial court's dismissal of Plaintiff's disparate treatment claim.

DATED this 4th day of November, 2019.

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CERTIFICATE OF SERVICE

On November 4, 2019, I hereby certify that I electronically filed the foregoing RESPONDENT'S CORRECTED ANSWERING BRIEF with the Clerk of the Court and I delivered a true and accurate copy pursuant to the e-service agreement of the parties to the following:

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Comments:

Corrected to include CP numbers on page 1, deleted footnote 1, and dated for today.

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