

NO. 29043-3-III

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

JAMES CROWNOVER, HAROLD DELGADO, ROY GILLIAM, JOEL
HAVLINA, and KELLI GINN,

Appellants,

v.

THE STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION,

Respondent.

RESPONDENT'S RESPONSE BRIEF FOR JAMES CROWNOVER

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF ISSUES ON APPEAL.....2

 1. Whether the Statute of Limitations bars Crownover’s claim because the only alleged offensive conduct occurred outside of the three-year time frame?2

 2. Whether sporadic joking comments between male co-workers can support a claim for hostile work environment?2

 3. Whether Crownover’s retaliation claim was properly dismissed because Crownover failed to produce evidence of any negative employment action that could be related to a protected activity?2

III. STATEMENT OF THE CASE.....2

 A. Factual Background Regarding Crownover’s Hostile Work Environment Claim.....2

 B. Facts Relating to Crownover’s Retaliation Claim.10

 C. Facts Relating to Crownover Leaving His Employment with DOT.13

 D. Many of Crownover’s Allegations Are Irrelevant To His Discrimination and Retaliation Claims Or Are Not Competent Evidence Because They Are Not Based Upon Crownover’s Personal Experience.....14

 1. The Connell crew was called lazy.....14

 2. Connell’s prior lead tech, Jim Leroue, got mad at the crew over work related issues.....15

 3. Unsupported speculation that Crownover was blackballed.....16

4.	Havlina’s Fall 2001 story regarding a superintendent’s daughter.....	17
5.	Comment by Bob Skubbina to Joel Havlina in 1996.	17
6.	Assertion that the Connell lead tech heard offensive comments.....	18
IV.	STANDARD OF REVIEW.....	19
V.	ARGUMENT	20
A.	Crownover’s Claim is Barred by the Statute of Limitations.	20
B.	In Addition to Being Completely Outside of the Statute of Limitations, One Offensive Sexual Joke Between Male Co-workers Does Not Support a Claim for Discrimination.....	24
1.	The alleged conduct was not motivated by gender.	25
2.	The conduct does not rise to the level of severe and pervasive.....	27
3.	The conduct is not imputed to the DOT.	29
C.	Plaintiff Cannot Avoid Summary Judgment By Altering His Prior Sworn Testimony.	31
D.	Conclusory Allegations Cannot Prevent Summary Judgment.....	33
E.	Crownover Fails to Establish Any Facts To Support a Claim for Retaliation.....	34
VI.	CONCLUSION	37

TABLE OF AUTHORITIES

Cases

<i>Adams v. Able Bldg. Supply, Inc.</i> , 114 Wn. App. 291, 57 P.3d 280 (2002).....	25, 26
<i>Antonius v. King County</i> , 153 Wn.2d 256, 103 P.3d 729 (2004).....	20, 21, 22
<i>Arendale v. City of Memphis</i> , 519 F.3d 587 (6th Cir. 2008)	33
<i>Burkhart v. American Railcar Industries, Inc.</i> , 603 F.3d 472 (8th Cir. 2010)	23, 24
<i>Campbell v. State</i> 129 Wn. App. 10, 118 P.3d 888 (2005).....	35
<i>Cecil v. Louisville Water Co.</i> , 301 Fed. Appx. 490 (6th Cir. 2008).....	33
<i>Clarke v. State Attorney General’s Office</i> , 133 Wn. App. 767, 138 P.3d 144 (2006).....	25
<i>Coville v. Cobarc Services, Inc.</i> , 73 Wn. App. 433, 869 P.2d 1103 (1994).....	25
<i>Craig v. M & O Agencies, Inc.</i> , 496 F.3d 1047 (9th Cir. 2007)	25
<i>Davis v. West One Automotive Group</i> 140 Wn. App. 449, 166 P.3d 807 (2007).....	35
<i>Doe v. Dep’t of Transp.</i> , 85 Wn. App. 143, 931 P.2d 196 (1997).....	25
<i>Doe v. Dept. of Transp.</i> , 85 Wn. App. 143, 931 P.2d 196, review denied, 132 Wn.2d 1012, 940 P.2d 653 (1997)	34

<i>Ellison v. Brady</i> , 924 F.2d 872 (9th Cir. 1991)	30
<i>Estevez v. Faculty Club of University of Washington</i> 129 Wn. App. 774, 120 P.3d 579 (2005).....	35
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).....	27, 28
<i>Glasgow v. Georgia-Pacific Corp.</i> , 103 Wn.2d 401, 693 P.2d 708 (1985).....	25
<i>Gross v. Burggraf Const. Co.</i> , 53 F.3d 1531 (10th Cir. 1995)	28
<i>Harris v. Forklift Systems, Inc.</i> , 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).....	27
<i>Hernandez v. Spacelabs Medical, Inc.</i> , 343 F.3d 1107 (9th Cir. 2003)	33
<i>Herried v. Pierce County Public Transp. Ben. Authority Corp.</i> , 90 Wn. App. 468, 957 P.2d 767 (1998), review denied 136 Wn.2d 1005, 966 P.2d 901 (1998)	26, 30
<i>Howley v. Town of Stratford</i> , 217 F.3d 141 (2d Cir. 2000)	28
<i>Kahn v. Salerno</i> , 90 Wn. App. 110, 951 P.2d 321 (1998).....	27
<i>Lovelace v. BP Products North America, Inc.</i> , 252 Fed. Appx. 33 (6th Cir. 2007).....	23, 33
<i>Lucas v. Chicago Transit Authority</i> , 367 F.3d 714 (7th Cir. 2004)	21
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	19, 20

<i>Marthaller v. King County Hosp., Dist. 2,</i> 94 Wn. App. 911, 973 P.2d 1098 (1999).....	31
<i>Michelsen v. Boeing Co.,</i> 63 Wn. App. 917, 826 P.2d 214 (1991).....	34
<i>Milligan v. Thompson</i> 110 Wn. App. 628, 42 P.3d 418 (2002).....	35
<i>Morris v. Oldham County Fiscal Court,</i> 201 F.3d 784 (6th Cir. 2000)	24, 28
<i>National R.R. Passenger Corp. v. Morgan,</i> 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)..	20, 21, 22, 23
<i>Neview v. D.O.C. Optics Corp.,</i> 382 Fed. Appx. 451 (6th Cir. 2010).....	30
<i>O'Connor v. City of Newark,</i> 440 F.3d 125 (3d Cir. 2006)	23
<i>O'Rourke v. City of Providence,</i> 235 F.3d 713 (1st Cir. 2001).....	28
<i>Oncale v. Sundowner Offshore Services, Inc.,</i> 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).....	26
<i>Panelli v. First American Title Ins. Co.,</i> 704 F. Supp. 2d 1016 (D. Nev., 2010).....	28
<i>Payne v. Children's Home Soc. of Washington, Inc.,</i> 77 Wn. App. 507, 892 P.2d 1102 (1995).....	26
<i>Pieszak v. Glendale Adventist Medical Center,</i> 112 F. Supp. 2d 970 (C.D. Cal. 2000)	28
<i>Sangster v. Albertson's, Inc.,</i> 99 Wn. App. 156, 991 P.2d 674 (2000).....	26
<i>Sharbono v. Universal Underwriters Ins. Co.</i> 139 Wn. App. 383, 161 P.3d 406 (2007).....	35

<i>Washington v. Boeing Co.</i> , 105 Wn. App. 1, 19 P.3d 1041 (2000).....	30
<i>Yamaguchi v. U.S. Dep't of the Air Force</i> , 109 F.3d 1475 (9th Cir. 1997)	30

Statutes

RCW 4.16.080	20
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Rules

RAP 9.12.....	20
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I. INTRODUCTION

JAMES CROWNOVER (“Crownover”) claims that he was “subjected to a hostile work environment in the workplace and retaliation for reporting harassment in the workplace” while he worked at the Washington State Department of Transportation (“DOT”). CP 1402, CP 1436. Crownover asserts that he was offended by one inappropriate joking comment of a sexual nature made by a co-worker in 2000. He complained about the comment over two years later, and the co-worker was disciplined. That co-worker made no offensive comments to Crownover after 2000. The alleged inappropriate comment occurred outside of the statute of limitations. The hostile work environment claim was dismissed by the trial court for both procedural and substantive reasons: because it was barred by the statute of limitations and because it failed to meet the required elements of hostile work environment claim.

Crownover admitted that he could not identify any negative employment action taken against him in support of his claim for retaliation. Therefore, the trial court properly granted summary judgment dismissal of Crownover’s retaliation and constructive discharge claims. The DOT respectfully submits that the trial court’s decision dismissing all of Crownover’s claims should be affirmed.

II. STATEMENT OF ISSUES ON APPEAL

1. **Whether the Statute of Limitations bars Crownover's claim because the only alleged offensive conduct occurred outside of the three-year time frame?**
2. **Whether sporadic joking comments between male co-workers can support a claim for hostile work environment?**
3. **Whether Crownover's retaliation claim was properly dismissed because Crownover failed to produce evidence of any negative employment action that could be related to a protected activity?**

III. STATEMENT OF THE CASE

A. **Factual Background Regarding Crownover's Hostile Work Environment Claim.**

James Crownover filed suit on September 6, 2005, asserting claims for hostile work environment, sexual harassment, retaliation, and constructive discharge. CP 1435-1436. Crownover was a Maintenance Technician with the DOT stationed at the Connell DOT shop. CP 765. The Connell shop was a six man crew with five maintenance technicians and one lead technician. CP 765. There were no DOT managers stationed in Connell. *Id.* The Connell crew was supervised by the Supervisor stationed in Pasco. *Id.* Mike Kukes was the Pasco Supervisor who supervised Crownover from 1999 to February 2001, when Tom Lenberg took over as Supervisor. CP 542, L. 6-13; CP 686-687.

Mark Brewster was a maintenance technician in Pasco and part of the Pasco crew at the time of the allegations made by Crownover. CP 562, L. 1-2. According to the appellants, “sometimes the two crews worked together.” Crownover’s Opening Brief, p. 5. Crownover does not quantify how frequently he worked with Brewster or the Pasco crew, but in his affidavit he described it as “occasionally.” CP 447, L. 13.¹

Crownover reported that when he and Mark Brewster were both maintenance technicians, Brewster allegedly made one inappropriate comment to him in reference to his daughter in 2000, and then no other inappropriate comments were ever made. CP 1339, 1349, 1373. The one comment as asserted by Crownover allegedly occurred in the fall of 2000, while the employees were socializing at an expo in Moses Lake. CP 565, L. 9-16. Joel Havlina commented that Crownover’s 17-year old daughter was attractive. CP 565, L. 9-16. In response to this comment, Brewster allegedly laughingly commented that he could “break in” Crownover’s daughter. CP 565, L. 13-15; 1345.

Crownover testified that he had no idea what motivated the comment. “I cannot guess the motivation of Mark Brewster. As a bully,

¹ Another Connell crew member indicated that he worked with Brewster “several times.” CP 1256. Ginn, a plaintiff from the Pasco crew, testified that during her employment she worked with the Connell crew approximately 10 times. CP 888. The Connell crew rarely had contact with Ginn or Bumpaous on the Pasco crew. CP 457.

he may feel at liberty to bully men, more than women. He may have thought he could avoid punishment by being rude and offensive in front of men.” CP 391, No. 12. Appellant Roy Gilliam, the Connell lead maintenance technician, did not relate any of the comments to gender, and testified that sexual jokes or comments were not uncommon between the men, because they “worked with 99 percent men.” CP 1035 -1036, CP 1046, L. 22-25.

Brewster and Don Shute, the one independent witness attending the expo, denied that Brewster made the one comment alleged by Crownover regarding his daughter in the fall of 2000. CP 1375. Crownover did not make any complaint to management at the time of the alleged 2000 comment. CP 1349-1350. The one alleged comment by Brewster was reported to management only after Brewster made a complaint about Crownover’s conduct in 2002. CP 1345-1349.

In the spring of 2002, Mark Brewster worked with the Connell crew for three days on a construction job. CP 345, 448, 450, 1080, 846-848, 1345-1346. Brewster reported concerns about the Connell crew’s work performance, and the crew being lazy.² CP 847, L. 24, CP 562, L. 9-10. Brewster referred to the Connell crew as a “waste of breath.” CP 864,

² As a lead tech in 2002, Brewster had no authority to discipline, but would report information to the Supervisor who supervised both Brewster and the Connell crew. He was not Crownover’s boss. CP 1346, L. 16.

L. 6. In the spring of 2002, Brewster also reported that Crownover was creating a hostile work environment relating to his language and treatment of other workers. CP 848, L. 2-4. The term hostile work environment, as Brewster understood it, was not referencing any form of discrimination, it related to a DOT policy that prevented hostile behavior in the workplace.

In June 2002, Tom Lenberg came to Connell to talk to the Connell crew about Brewster's complaints. Crownover Opening Brief, p. 20, ¶2. Joel Havlina and Jim Crownover, who were good friends, were both present. *Id.* In response to Brewster's complaints about Crownover and the Connell crew, in the June 2002 meeting, Havlina asserts that he told Tom Lenberg that he was confused about how Crownover's conduct could be a hostile work environment when Brewster had used profanity and made inappropriate comments in the past.³ CP 867, L. 1, CP 448, L. 13-17, CP 1348-1350; Crownover Opening Brief, p. 20.

³ Havlina and Crownover admitted in the 2003 OEO investigation that no specific complaints were provided in the June 2002 meeting with Tom Lenberg. CP 1072. "Mr. Lenberg stated that Mr. Crownover shared that there had been some personal comments made (specifics weren't given) and Mr. Havlina made a similar comment." CP 1072. Tom Lenberg denied any specific allegations of sexual comments were provided in that meeting, but the Connell crew generally complained about Brewster calling them to task or making them work. CP 699-700. Crownover and Havlina later claimed that the one comment regarding Crownover's daughter, and the alleged hip gyration in front of Havlina were reported in June 2002. CP 867, L. 1; CP 1065, CP 448, L. 17-18; CP 867, L. 1. Crownover's Opening Brief, p. 20. Solely for the purposes of summary judgment, the DOT assumes plaintiffs' testimony is true and the earliest date of a complaint of sexual comments was made in June 2002.

It was undisputed that Brewster's complaints about Crownover and the Connell crew prompted Havlina's complaint about Brewster. RP (January 15, 2008), pp. 63-64; CP 448, L. 13-20; CP 1348-1350. Crownover describes Brewster's spring 2002 complaint against Crownover as "that's pretty much what started all of this stuff." CP 1346, L. 1-3; CP 448, L. 13-20. Crownover could not recall making any complaint about the fall 2000 comment before the meeting with Tom Lenberg in 2002. CP 1349. Crownover did not recall raising a complaint about Brewster prior to Brewster accusing Crownover of creating a hostile work environment in the spring of 2002. CP 1349, L. 10-17. Crownover testified that, even in 2002, he did not raise the complaint, but he "just followed up after it got started when Joel [Havlina] brought it up." CP 1348, L. 9-16.

Havlina organized meetings with the Connell crew to document and come up with any and all complaints they could against Brewster because they did not want to work with him. CP 304-305. On September 16, 2003, three Connell crew members, Joel Havlina, Jim Crownover, and Harold Delgado, reported to Tom Lenberg and Tom Root that from 1990 to 2000 Brewster made several "offensive comments and gestures of a sexual nature to or around them." CP 1369. The DOT Office of Equal Opportunity had the Human Resource Consultant, Julie

Lougheed, conduct an investigation.⁴ According to the OEO investigation, the complaints by the Connell crew about Brewster prior to 2003 were that they did not like working with him because he made them work, nit-picked their work, or took them to task. CP 700, 1047-¶¶1050, 1072, 1080.

The only complaint reported by Crownover in the 2003 OEO investigation was the one fall 2000 comment in reference to his daughter. CP 1065-1082. Crownover admitted in response to written discovery that all of his complaints were reported and addressed in the Lougheed report. CP 390-391. In addition, Crownover testified in his 2007 deposition that other than the one alleged comment in the fall of 2000, he could not recall being present or ever hearing any other sexually engendered comments by Brewster. CP 1339, CP 1342, L. 24 – CP 1343, L. 19.

The whole Connell crew was male, and it was admitted that sexual jokes and foul language were not uncommon in the 1990 to 2000 time frame amongst the all male Connell crew. CP 1035. Crownover admits to using profanity. CP 1347, L. 5-7. Roy Gilliam, as the lead tech present in the Connell shop, testified that no one complained or seemed offended by the sexual jokes or references that went on amongst the all male crew.

⁴ Havalina and Crownover at some point confused the dates of the OEO investigation and they refer to the September 2003 meeting and the 2003 OEO investigation as occurring in the fall of 2002 instead of the fall of 2003. CP 448.

CP 1036. Despite the general acceptance of this joking and banter by the Connell crew, DOT determined that this atmosphere was not appropriate in the workplace. CP 1359, L. 2-7; CP 683. Brewster and other individuals participating in the mutual jokes or banter were disciplined as a result of the Loughheed OEO investigation. CP 1359, L. 2-7; CP 683. It was not disputed that Brewster received a reduction in pay and written reprimand. CP 1359.

Brewster never said anything inappropriate to Crownover after the fall of 2000 or after the OEO investigation and discipline. CP 1347, 1349-1350, 1352, L. 19-25, 1359, L. 8-15. No complaints were made relating to any sexually engendered comments after 2001 when Tom Lenberg became the Supervisor. CP 1368-1386, CP 686, 696-697. It was all talk of what happened back in the 1990's. CP 696-697. As Crownover testified in his deposition:

Q. In the Loughheed investigation, Julie Loughheed reports that you, Joel Havlina, Harold Delgado and Roy Gilliam all reported that the sexually engendered comments or conduct had stopped in 2001. Can you identify any sexually engendered comments or misconduct after 2001?

A. No.

CP 1366, L. 1-7.

Roy Gilliam was the lead tech that worked in Connell. CP 411. Gilliam would be the first person Crownover would go to with a

complaint. CP 411, L. 4-6. The only complaint Gilliam ever became aware of after 2002 was the one comment about Crownover's daughter that allegedly occurred in 2000. CP 1045.

The only complaint Crownover ever raised regarding sexual comments was regarding the one comment by Mark Brewster in 2000, more than five years before this case was filed. CP 1351, 1344. Crownover clearly denies any knowledge of offensive comments or conduct of a sexual nature other than this one comment in the fall of 2000. CP 1352, L. 19-25; CP 1347, L. 19-23. Crownover could not recall witnessing any other alleged sexually engendered conduct by Brewster towards other appellants. CP 1358, L. 19-24. As he testified in his deposition:

Q. Okay. My question to you is, other than what you've identified in your interrogatory responses, [as] a comment that Mark Brewster made about your daughter in the fall of 2000 at an expo, are there any other sexually engendered comments that you claim Mark Brewster made to you?

A. Not that I remember. About me or my daughter?

Q. Just any sexually engendered comments that he made to you, that he directed at you in any way. It didn't have to be about your daughter. It could be about anything.

A. Not that sticks in my mind.

CP 1339, L. 19 – CP 1340, L. 6.

Q. Okay. We've talked about sexually engendered comments. Do you contend there was any other sexually motivated conduct or behavior directed at you, other than the comments we've discussed made by Mark Brewster in the fall of 2000?

A. No. I don't think there was. Not that I recall.

CP 1352, L. 19-25.

Crownover also testified that he was not contending that anyone other than Brewster made any sexually engendered comments directed at him.

Q. Other than the comment that Mark Brewster made in the fall of 2000 about your daughter, do you contend anyone else made any sexually engendered comments directed at you?

A. No.

CP 1344, L. 2-6.

B. Facts Relating to Crownover's Retaliation Claim.

Crownover's Complaint alleged that he was retaliated against for union activity and for reporting a hostile work environment. CP 1436. Crownover admitted in written discovery responses and his deposition that he never engaged in any union activity other than being a member and going to pizza. CP 1359-1360. Crownover could not identify any action against him because of his membership or involvement in the union. CP 1360.

Crownover acknowledged that he was never disciplined—that he is aware of—while he was employed with the DOT. CP 1353, L. 7-15. He speculated that he might have been blackballed in the state for transfers, but he does not know. CP 1353, 1356. He could not identify any negative action taken by anyone in management to affect his employment. CP 1356-1357.

Q. ...What I want to know is, while you were employed at the DOT, not after, but while you were employed at the DOT, do you contend any manager took any negative action against you which affected the terms of your employment?

A. Took any action, no, that I'm aware of.

CP 1356, L. 21-CP 1357, L. 1.

Crownover speculates that at some point spraying and plowing in Pasco became more important than spraying and plowing in Connell but he does not know why or when. CP 1361-1362. Crownover had no evidence that any changes in the work needs in Pasco were in any way related to his complaint. CP 1362, L. 9-13. Other than the need to perform some work in Pasco, Crownover did not have any other claim for retaliation. CP 1363, L. 9-23. Crownover has no information that the work needs in Pasco were in any way influenced by his complaint. CP 1363-1364. Nor did he know who made the decision about the work needs in Pasco or Connell. CP 1363-1364.

Q. Do you have any factual information that the decision that there was a greater need for spraying and plowing in Pasco than in Connell, that that decision had any relation to any complaint made by you?

A. I don't have any facts.

CP 1362, L. 9-13.

The Connell crew was assigned to the "South Central Region, Maintenance Area 3," which includes Pasco. CP 393-398, CP 398. The Connell crew was always required to work in Pasco throughout their employment with the DOT. CP 447. The road needs in Pasco have always been higher than the needs in Connell due to the volume of traffic, which Crownover does not dispute. CP 1364-1365.

Fellow appellant, Roy Gilliam, provided a sworn statement that the Connell crew was sent to Pasco more often to work starting in 2000. CP 843. Crownover also indicated in his responses to interrogatories that the Connell crew started to work in Pasco "more often" when Casey McGill was promoted to Assistant Regional Administrator in 2000 or 2001. CP 413. This change in the work needs requiring the Connell crew to work in Pasco was initiated before Crownover's complaint about Brewster in June 2002 and, thus, could not have been retaliatory. *Id.*; Crownover's Opening Brief, p. 20, ¶2.

The change in spraying work needs was directed out of Olympia before 2002.⁵ CP 274-287. Crownover has no reason to dispute management's position that the work needs were greater in Pasco than in Connell which is why he was sent to Pasco to work. CP 1365, L. 16-24.

C. Facts Relating to Crownover Leaving His Employment with DOT.

In response to the summary judgment motion, Crownover claimed in an unsigned affidavit⁶ that "I left my employment with the Department of Transportation, because I found less stressful work in Iraq." CP 450, L. 25-CP 451, L. 1. The affidavit was drafted by Crownover's counsel purportedly based upon Crownover's deposition testimony and discovery responses that were not attached to the affidavit. CP 628-629. Crownover's deposition testimony confirmed that he voluntarily left his employment with the DOT in 2005 to take a job making more money in the private sector. CP 1357, L. 2-4, CP 1354-1355. Crownover went from making approximately \$30,000 per year as an employee for DOT to

⁵ An environmental organization was pressuring the DOT to decrease its use of pesticides, and the Secretary of the DOT committed to a reduction in spraying well before 2002. Spraying pesticides decreased state wide. Management in area 3 out of Pasco were not involved in the decrease, and the commitment to decrease occurred before 2002. CP 274-287, *see also* DOT's Response Brief for Joel Havlina.

⁶ Mr. Fearing represented that a signed copy of the declaration would be filed. DOT argued the declaration contradicted Crownover's sworn testimony and, consequently, had limited value. Based upon the record on appeal, it does not appear Mr. Fearing ever filed a signed copy of Crownover's affidavit. He relies upon the unsigned declaration throughout the fact section of his appellate brief.

making up to \$10,000 a month for a construction company out of Houston.

Id. Crownover chose to take the higher paying job instead of staying with the DOT. CP 1354.

In addition, Crownover's new job in Houston required a 30 day probationary period. CP 1352. Crownover requested leave without pay for 30 days to start the new job so he could return to the DOT if he did not pass probation. *Id.* The DOT let Crownover take the leave for the probationary period. *Id.* After passing the probation for the job in Houston, Crownover "quit" or "resigned" from the DOT. CP 1352 L. 15.

D. Many of Crownover's Allegations Are Irrelevant To His Discrimination and Retaliation Claims Or Are Not Competent Evidence Because They Are Not Based Upon Crownover's Personal Experience

1. The Connell crew was called lazy.

The Connell crew complained about having to do priority work when Mike Kukes was their supervisor prior to February 2001. CP 450, L. 2-5; CP 681; CP 843. In response to frequent complaints about having to work in Pasco during the summer of 2000, Mike Kukes called the Connell crew "waterasses" (which meant lazy) and whiners. CP 413; CP 681; CP 450. "Waterasses" was a term Mike Kukes used with his own kids. *Id.* Crownover asserts when Mike Kukes was their supervisor, he called the whole Connell crew crybabies and waterasses. CP 450, L. 2-3;

CP 681. Mike Kukes was not the supervisor for the Connell crew after February 2001, and, thus any statement he may have made to the Connell crew is outside the statute of limitations. CP 542, L. 6-13; CP 686-687. Furthermore, the name calling by Kukes occurred before 2001, and it is not related to the complaint about Brewster in June of 2002. CP 867, L. 1, CP 448, L. 13-17, CP 1348-1350; Crownover Opening Brief, p. 20; CP 686-687.

2. Connell's prior lead tech, Jim Leroue, got mad at the crew over work related issues.

Jim Leroue was the lead tech in Connell between 1994 and January 2000. CP 841. Roy Gilliam took over as Connell lead tech in March of 2000. CP 840-841. In opposition to summary judgment, Crownover states in an unsigned affidavit that Jim Leroue was mean and threatening as a lead tech. CP 446. Crownover admits in his deposition that the issues with Jim Leroue were anger relating to work issues that mostly arose out of Leroue's dissatisfaction with Crownover's work performance. CP 401-406. Crownover has not had any contact with Jim Leroue since 2000. CP 407. It was undisputed that Jim Leroue's anger over work issues had nothing to do with gender, sex, race or any protected status. RP (January 15, 2008), p. 29; CP 469, L. 13-15.⁷

⁷ The Court: I don't think any of these constituted either sexual or racial comments of any kind. We're talking about Mr. Leroue now?

3. Unsupported speculation that Crownover was blackballed.

Crownover's attorney argued that Crownover was blackballed within the DOT because he was not interviewed for a transfer to Washtucna. RP (January 15, 2008), pp. 66-68. Crownover testified in his deposition on October 30, 2007 that he was scheduled for an interview for a transfer to Washtucna, but he chose not to go to the interview because he accepted a higher paying job in Houston. CP 1354.

Crownover now argues, for the first time, in his opening brief that he was denied a transfer in 1999-2000 when he worked with Jim Leroue. Crownover Opening Brief, p. 9, citing Crownover's unsigned affidavit at CP 446. This alleged blackballing occurred prior to Crownover's complaint in June 2002 and well outside the statute of limitations. *Id.*; CP 867, L. 1, CP 448, L. 13-17, CP 1348-1350; Crownover Opening Brief, p. 20. This alleged denial of transfer was not raised by Crownover in his deposition when he was asked to identify any alleged retaliation, and he specifically denied that any managers took any negative action against him. CP 1363, CP 1356-1357.

Mr. Fearing: Correct. That would be correct. RP (January 15, 2008), p. 29, L. 3-6.

4. Havlina's Fall 2001 story regarding a superintendent's daughter.

Crownover does not identify hearing or being offended by any alleged story in the fall of 2001 in his 2007 deposition or in his affidavit, and he did not claim any offensive comments by anyone other than Brewster. CP 445-451, CP 1344, L. 2-6. Crownover's opening brief mentions that Joel Havlina's uncle was a superintendent with the DOT, and Havlina claimed he was offended when a rumor circulated that the superintendent's daughter was having a sexual relationship with another DOT employee. CP 844. As noted above, in his sworn deposition testimony, Crownover denies being offended by any comments other than the one by Brewster.⁸ This allegation does not relate to Crownover in any manner, and is irrelevant to the issue before this court.

5. Comment by Bob Skubbina to Joel Havlina in 1996.

Crownover's opening brief references a comment Crownover allegedly heard Bob Skubbina make to Joel Havlina. Crownover Opening Brief p. 16. Skubbinna was on the Connell crew in 1995 or 1996. CP 546. Crownover's deposition testimony did not identify Crownover

⁸ Q. Other than the comment that Mark Brewster made in the fall of 2000 about your daughter, do you contend anyone else made any sexually engendered comments directed at you?

A. No.

CP 1344, L. 2-6.

having any objection, complaint or issue with Bob Skubbina. CP 1344, 1351. This comment, which was never reported to DOT management during Skubbina's employment, is outside the statute of limitations. This is again hearsay, irrelevant to the issue Crownover has raised in this court.

6. Assertion that the Connell lead tech heard offensive comments.

Crownover's opening brief generally argues that the Connell lead tech, Roy Gilliam, heard "many offensive comments" by Mark Brewster. Crownover Opening Brief p. 22 par. 2, citing CP 847, Gilliam's affidavit in opposition to summary judgment. This assertion directly contradicts Gilliam's prior sworn deposition testimony that he never witnessed any conduct by Mr. Brewster that he found offensive. CP 513, L. 21-24, 1045-1046.

Q. Did you ever witness any conduct by Mr. Brewster that you were personally offended by of a sexual nature?

A. No.

CP 513, L. 21-24. Gilliam only heard about incidents relating to Brewster second hand in a group meeting. CP 513, L. 15-20; CP 1045-1046. Gilliam only became aware of Crownover having one complaint about the alleged comment in the fall of 2000 in reference to Crownover's daughter long after the comment was made. CP 1045. The other complaints were made by Havlina and Delgado. CP 1045-1046; CP 1368-1386. More

significantly for purposes of Crownover's argument and brief, it is unclear how offensive comments, purportedly heard by Gilliam, affected Crownover, since Crownover testified in his deposition to having heard only one offensive comment, made by Brewster, and that comment was made outside the statute of limitations in 2000. CP 1352, L. 19-25.

Crownover also argues in his opening brief that "many of Mark Brewster's comments occurred in front of managers." Crownover Opening Brief at 40, ¶2. No citation to the record is provided in support of this contention. *Id.* The one comment reported as being offensive by Crownover allegedly occurred at an expo in front of Joel Havlina and Don Shute, both of whom were maintenance technicians like Crownover. CP 1370, 1374-1375, CP 448, L. 8-9. No managers were present. *Id.* No sexual comments directed at Crownover are identified anywhere in the record as taking place in front of managers. CP 1368-1375.

IV. STANDARD OF REVIEW

The standard of review for cases resolved on summary judgment is a matter of well-settled law. This court considers those matters de novo, relying upon the same evidence presented to the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of

material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.* On review of an order granting a motion for summary judgment, an appellate court will consider only evidence and issues that have been called to the attention of the trial court. RAP 9.12.

V. ARGUMENT

A. Crownover's Claim is Barred by the Statute of Limitations.

Washington law is clear that a Plaintiff is subject to the three year statute of limitations for filing a discrimination claim. *Antonius v. King County*, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004); RCW 4.16.080(2). At the summary judgment level, Crownover made two arguments in response to the violation of the statute of limitations: 1) that a six year statute of limitations applies; and 2) that the continuing violation doctrine applies. With regard to the first argument, the trial court correctly held that there was no contract claim pleaded in this case to warrant a six year statute of limitations. RP (January 15, 2008), p. 6-10, 30.

As to the second argument, the continuing violation doctrine still requires discriminatory acts to occur within the statute of limitations. *Antonius*, 153 Wn.2d 256; *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). The continuing violation doctrine is intended to address a series of acts which collectively

constitute conduct based upon a discriminatory animus. The doctrine provides that when a series of discriminatory acts occurs to create a cause of action for hostile work environment, all of the conduct may be considered when some of the related acts which arise out of the same discriminatory animus occur within the statute of limitations. *Antonius*, 153 Wn.2d 256; *Morgan*, 536 U.S. at 117.

It is undisputed that “a part of the alleged violation needs to occur within the three-year period in order to consider the continuing violation doctrine.” *Antonius*, 153 Wn.2d at 263-264; *Morgan*, 536 U.S. at 117. **“The Plaintiff must establish one or more acts based upon the same discriminatory animus within the statute of limitations.”** *Antonius*, *supra* at 265. [emphasis added].⁹ Acts which are not part of the same hostile work environment cannot be considered. *Lucas v. Chicago Transit Authority*, 367 F.3d 714 (7th Cir. 2004).

In this case, Crownover readily admits that his complaint was based upon one rude and offensive comment made in the fall of 2000. He admits that there was no objectionable sexual conduct directed at him or any other sexual conduct or comments that he complained about to anyone. In his opening brief on appeal, Crownover now admits that the

⁹ If “for some other reason, such as certain intervening action by the employer” the act is “no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts”. *Morgan*, 536 U.S. at 118, 122 S. Ct. 2061.” *Antonius*, *supra* at 271.

three year statute of limitations is the correct time period. Crownover Opening Brief, p. 33. Crownover does not identify any sexual harassment within the statutory limitation period, but he argues that he “suffered from retaliatory treatment” until he resigned in 2005. Crownover Opening Brief, p. 34. Crownover incorrectly argues that the alleged retaliation should be included for the purposes of determining whether any conduct occurred within the statute of limitations for his hostile work environment claim. Crownover Opening Brief, p. 34. There is no citation to support this contention, and this position is contrary to Washington law which specifically distinguishes between discrete adverse employment actions and a series of sexual comments that could collectively constitute discrimination.

Discrete discriminatory acts or retaliatory employment action must always be within the statute of limitations to be actionable. *Morgan*, 536 U.S. at 115-116. Under the statute of limitations, the “employee can not recover for the previous [untimely] acts, at least not by reference to [an unrelated timely act].” *Id.* at 118. Under *Morgan*, a “court’s task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice,... The acts must have some relationship to each other to constitute part of the same hostile work environment claim.” *Antonius*, supra at 271. The conduct within the

statute must be based upon the same discriminatory motive or summary judgment is warranted. *Lovelace v. BP Products North America, Inc.*, 252 Fed. Appx. 33, 40 (6th Cir. 2007). Unrelated to the claim of hostile work environment, “[E]ach retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’” *Morgan*, 536 U.S. at 113-114; *O’Connor v. City of Newark*, 440 F.3d 125, 127 (3d Cir. 2006). Retaliatory conduct cannot be combined with the alleged discrimination to avoid the statute of limitations on the hostile work environment claim.

For instance, in *Burkhart v. American Railcar Industries, Inc.*, 603 F.3d 472 (8th Cir. 2010), the plaintiff complained about sexual e-mails and comments that occurred outside of the statute of limitations and complained about being shunned, suspended and terminated within the statute of limitations. The plaintiff sought to claim that all of the conduct was part of one hostile work environment claim including the sexual e-mails and comments and the alleged retaliatory actions. *Id.* The court rejected this argument because there was no evidence that the sexually explicit emails or comments continued. *Id.* The court noted that being shunned, suspended or terminated was conduct of a different nature and was more of a claim of retaliation and could not be considered to be sexual harassment. *Burkhart*, *supra* at 476. Therefore, plaintiff’s sexual

harassment claim was time barred. *Id.*; see also, *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 790-91 (6th Cir. 2000) (refusing to include alleged retaliatory conduct in the hostile work environment calculus because the conduct was not committed because of sex).

In this case, Crownover fails to identify any conduct motivated by gender discrimination within the statute of limitations. The one sexually engendered comment Crownover claimed was directed at him occurred in the fall of 2000. Crownover's complaint was filed in September of 2005, and the alleged conduct is well outside of the statute of limitations. CP 1435. Asserting a claim for retaliation does not alter the statute of limitations on his hostile work environment claim. The trial court correctly applied the three year statute of limitations to the hostile work environment claim and found Crownover failed to identify any sexually engendered conduct within the statute of limitations. RP (January 15, 2008), pp. 68, 71.

B. In Addition to Being Completely Outside of the Statute of Limitations, One Offensive Sexual Joke Between Male Co-workers Does Not Support a Claim for Discrimination.

In addition to violating the statute of limitations, summary judgment was also warranted because the conduct does not meet the necessary elements of a hostile work environment gender discrimination claim. To establish a hostile work environment claim based on sexual

harassment, an employee must prove the following: (1) the action was unwelcome; (2) the action was because of gender; (3) the action was severe and pervasive enough to affect the terms or conditions of employment; and (4) the action is imputed to the employer. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-408, 693 P.2d 708 (1985); *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1055 (9th Cir. 2007).

1. The alleged conduct was not motivated by gender.

Under the law, gender must be the motivating factor for the employer's treatment of the employee for a hostile work environment to exist. *Coville v. Cobarc Services, Inc.*, 73 Wn. App. 433, 438, 869 P.2d 1103 (1994); *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297, 57 P.3d 280 (2002); *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 138 P.3d 144 (2006). "Sex" in the context of a discrimination claim refers to gender, not just activity of a sexual nature generally. *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 149, 931 P.2d 196 (1997). "It is not sufficient to show that the employee suffered embarrassment, humiliation, or mental anguish arising from nondiscriminatory harassment." *Adams*, 114 Wn. App. at 298. Verbal abuse or harsh treatment by a supervisor towards an employee does not state a claim for hostile work environment because the behavior is not directed at the person because of their gender. *Payne v. Children's Home Soc. of Washington, Inc.*, 77 Wn. App. 507,

892 P.2d 1102 (1995); *Herried v. Pierce County Public Transp. Ben. Authority Corp.*, 90 Wn. App. 468, 473, 957 P.2d 767 (1998), review denied 136 Wn.2d 1005, 966 P.2d 901 (1998). When the evidence does not support the conclusion that the conduct was motivated by gender, summary judgment is warranted. *Payne*, supra.

Comments made to a group of people and not specifically directed at a plaintiff because of his or her gender do not support a discrimination claim. *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 162, 991 P.2d 674 (2000) (comment on another female employee's figure to a group was not directed at the plaintiff). Conduct which is merely tinged with offensive sexual connotations is not actionable unless it is directed at a person because of their gender. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

In this case, Crownover admits that he has no idea what motivated Brewster's comment about his daughter. Jokes of a sexual nature were common amongst the all male work crew and so was the use of profanity. The comment asserted by Crownover, if true, certainly would be considered vulgar, rude and offensive. However, it is insufficient that a co-worker's conduct is merely offensive or based on simple vulgarity. *Adams*, 114 Wn. App. at 296; *Kahn v. Salerno*, 90 Wn. App. 110,118, 951

P.2d 321 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

2. The conduct does not rise to the level of severe and pervasive.

Courts determine whether a plaintiff has proved a “hostile work environment” by looking at the totality of the circumstances, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). “The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct.” *Id.* On a motion for summary judgment in a sexual harassment case, the court must distinguish between facts that merely add up to the “ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes, and occasional teasing,” which do not support a claim for discrimination, from suggestive “sexual remarks, innuendoes, ridicule, and intimidation” which are directly linked to gender and rise to the level of impacting the plaintiff’s ability to work. *O’Rourke*

v. *City of Providence*, 235 F.3d 713, 729 (1st Cir. 2001); *Faragher*, 524 U.S. at 788.¹⁰

Comments that are “clearly inappropriate and in bad taste” do not meet the necessary severe and pervasive standard when “they occurred over a two-year period with relative infrequency.” *Panelli v. First American Title Ins. Co.*, 704 F. Supp. 2d 1016 (D. Nev., 2010). Even fifteen to twenty different comments in reference to sex or gender over an eighteen-month period failed to constitute an objectively abusive workplace. *Pieszak v. Glendale Adventist Medical Center*, 112 F. Supp. 2d 970, 992 (C.D. Cal. 2000).

The court must also consider pertinent circumstances including the nature of the workplace. *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995). For example, in *Gross*, the court noted that the claim of gender discrimination must be viewed in the context of a blue collar construction environment where crude language is commonly used by male and female employees. *Id.* at 1538. (“In the real world of construction work, profanity and vulgarity are not perceived as hostile or

¹⁰ Isolated incidents of inappropriate comments do not meet the severe and pervasive standard required. *Cecil v. Louisville Water Co.*, 301 Fed. Appx. 490 (6th Cir. 2008); see also *Morris*, 201 F.3d at 790 (holding that several dirty jokes, a verbal sexual advance, a one-time reference to plaintiff as “Hot Lips,” and comments about plaintiff’s state of dress were not sufficiently severe and pervasive). Single events are not sufficient to establish a severe and abusive environment, unless the event is so acute and extraordinary as to create an “intolerable alteration” of the working conditions. *Howley v. Town of Stratford*, 217 F.3d 141, 153 (2d Cir. 2000).

abusive.”). In this case, the Connell crew all engaged in sexual jokes and the use of profanity. They became disgruntled with Brewster because he was dissatisfied with their work performance in 2002. As a result, they asserted that over the past decade (1990-2001) Brewster made one joking sexual comment to Crownover, two to four joking sexual comments to Delgado, and three to six to Havlina. Crownover indisputably did not have any claim that Brewster made any sexual comments toward him after the one in the fall of 2000. Crownover admittedly indicated that it may have just been Brewster being rude and crude.

Crownover only worked with the Pasco crew “occasionally.” He could only identify one comment by Mark Brewster directed at him. Under the totality of the circumstances, this is an infrequent joking comment in very bad taste that the courts are directing be segregated from the type of conduct protected under the law on discrimination. Even if it were within the statute of limitations, Brewster’s isolated comment is inadequate to support Crownover’s gender discrimination claims against DOT.

3. The conduct is not imputed to the DOT.

Mark Brewster and Jim Crownover were both maintenance technicians at different shops at the time of the alleged comment. Before an employee’s actions are imputed to the employer, a plaintiff must

demonstrate that the employer (1) authorized, knew, or should have known of the harassment, and (2) failed to take reasonably prompt and adequate corrective action. *Washington v. Boeing Co.*, 105 Wn. App. 1, 11, 19 P.3d 1041 (2000). Summary judgment is warranted when an employee fails to establish knowledge on the part of the employer of the harassing behavior. *Neview v. D.O.C. Optics Corp.*, 382 Fed. Appx. 451, 456 (6th Cir. 2010). In addition, an employer on notice of alleged harassment may avoid liability for such harassment by undertaking remedial measures “reasonably calculated to end the harassment.” *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991); *Yamaguchi v. U.S. Dep’t of the Air Force*, 109 F.3d 1475, 1482 (9th Cir. 1997); *Herried*, 90 Wn. App. at 475. Once an employer reasonably responds, harassment cannot be imputed to the employer. *Washington v. Boeing Co.*, 105 Wn. App. at 12.

Mark Brewster was a maintenance technician, just like Crownover, in 2000. The DOT had no way of knowing about the alleged inappropriate comment in the fall of 2000 before it was reported in June of 2002. As a result of the report, an investigation was conducted and Brewster was disciplined. By all accounts, there were no sexual comments after the discipline. In fact, the comments reportedly stopped in 2001 even before the complaint was made and the investigation was conducted. Crownover never made a report to his employer of any sexually engendered conduct

directed at him other than the one comment in the fall of 2000. The DOT reasonably addressed the complaint once it was reported and took reasonable remedial action. Crownover admits that Brewster never made any comments to him of this nature after the fall of 2000.

C. Plaintiff Cannot Avoid Summary Judgment By Altering His Prior Sworn Testimony.

The law does not allow a witness to change his or her deposition testimony solely to defeat a Motion for Summary Judgment. “When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” *Marthaller v. King County Hosp., Dist. 2*, 94 Wn. App. 911, 918, 973 P.2d 1098 (1999).

Crownover’s complaint asserts that he was subjected to a hostile work environment based upon “sexually engendered comments and behavior.” CP 1436. Crownover clearly testified in his deposition that the only sexually engendered comment or behavior he had a complaint about or was offended by was the one comment in 2000 by Mark Brewster regarding his daughter. CP 1339-1340, 1342-1344, 1347, 1349-1355, 1359, 1366. . This was also the only complaint he reported to the OEO.

CP at 1339, 1349, 1373, 390-391, 1065-1082. In an effort to avoid summary judgment, Crownover's counsel provides an unsigned affidavit asserting additional jokes or comments between other employees and generally asserts Crownover knew about the other jokes.

Crownover's unsigned affidavit indicates that he heard Max Yager make joking comments to other individuals.¹¹ CP 447. However, Crownover testified in his deposition that Max Yager was a jokester, and that he did not have a bad working relationship with Max. CP 408.

Q. Did you ever make a complaint about Max Yager?

A. Not much. I don't believe. ...

CP 410, L. 19-22

Crownover testified that Roy Gilliam, his lead tech, would be the first person he would go to with a complaint. CP 411. Gilliam was not aware of Crownover complaining about anything other than the one comment by Brewster in the fall of 2000. CP 1045. Crownover could not recall complaining about Max Yager. CP 411, L. 17-23.

Crownover cannot alter his sworn testimony that he did not have any complaints about Yager making any alleged sexually engendered

¹¹ Crownover asserts that he was aware of one or two jokes with a racial reference that were offensive to Harold Delgado. CP 410-411. Crownover did not make any complaint to the OEO about Max Yager. CP 1368-1386. Harold Delgado's claims relating to alleged racial comments by Max Yager went to trial in December 2009, and Delgado voluntarily dismissed those claims before the close of Plaintiff's case. CP 1471-1473.

comments. Even if Crownover could alter his sworn deposition testimony with an unsworn affidavit, Crownover does not identify any sexually engendered comments or conduct by Yager directed at him within the statute of limitations.

D. Conclusory Allegations Cannot Prevent Summary Judgment.

Mere “conclusory allegations” or subjective claims of offense alone are insufficient to avoid summary judgment on a hostile work environment claim. *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107, 1116 (9th Cir. 2003); *Lovelace v. BP Products North America, Inc.*, 252 Fed. Appx. 33, 40 (6th Cir. 2007); *Cecil v. Louisville Water Co.*, 301 Fed. Appx. 490, 500 (C.A.6, 2008). (“[G]eneral, conclusory allegations of ‘open mockery and verbal abuse’ and ‘hostility’ that was ‘pervasive’ are also insufficient to survive summary judgment); *Arendale v. City of Memphis*, 519 F.3d 587, 605 (6th Cir. 2008) (conclusory assertions of continuous harassment are insufficient). Crownover asserts in his unsworn affidavit that he heard about jokes or comments occurring with other employees, and he generally asserts that he was offended. However, he never reported the comments even when given the opportunity during the OEO investigation in October 2003. His general assertions after the fact that he heard about other alleged jokes or comments between various unrelated employees transpiring over a ten to fifteen year period does not

enable him to avoid summary judgment on his claim for gender discrimination relating to conduct that he experienced or that was directed at him.

Similarly, with regard to his retaliation claim, Crownover cannot rely on conjecture, argument, or conclusory statements to defeat a motion for summary judgment. *Doe v. Dept. of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196, review denied, 132 Wn.2d 1012, 940 P.2d 653 (1997); *Michelsen v. Boeing Co.*, 63 Wn. App. 917, 920, 826 P.2d 214 (1991). He has to identify specific facts. In this case, the Connell crew was always required to work occasionally in Pasco. The crew generally claimed that the work needs in Pasco increased in 2000 to 2001. There is no evidence of a change in the work frequency in Pasco after the June 2002 report.

Crownover admits in his deposition that he cannot identify any negative employment action against him. His unsworn affidavit generally asserts conclusory allegations that his supervisors retaliated against him. He fails to identify which supervisor, when, what alleged adverse employment action was taken, or how it is potentially linked to the June 2002 report. This type of conclusory assertion cannot prevent summary judgment dismissal.

E. Crownover Fails to Establish Any Facts To Support a Claim for Retaliation.

In order to establish a prima facie case of retaliation, the plaintiff must show (1) he engaged in a statutorily protected activity; (2) he was discharged or had some adverse employment action taken against him; and (3) retaliation was a substantial motive behind the adverse employment action. *Davis v. West One Automotive Group*, 140 Wn. App. 449, 166 P.3d 807, 813 (2007), citing *Campbell v. State*, 129 Wn. App. 10, 22-23, 118 P.3d 888 (2005), review denied, 157 Wn.2d 1002, 136 P.3d 758 (2006). “If the employee makes out a prima facie case, the burden shifts to the employer to show that it acted on a legitimate, nondiscriminatory basis.” *Milligan v. Thompson*, 110 Wn. App. 628, 636, 42 P.3d 418 (2002). Once a legitimate reason is offered, the plaintiff has the burden to prove “the employer’s proffered explanation is unworthy of credence.” *Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774, 800, 120 P.3d 579 (2005). Plaintiff must be able to prove that retaliation for a protected activity was the substantial motive for the employment action that was taken. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 420-421, 161 P.3d 406 (2007).

In this case, Crownover claimed retaliation for reporting a hostile work environment and for union activity. Crownover admitted that he never engaged in any union activity, and that he could not identify any action taken against him related to any union activity. CP 1359-1360. He

testified that his only claim for retaliation was that he had to work in Pasco instead of Connell. CP 1363. By his own description, he only worked in Pasco “occasionally”. CP 447. Crownover did not dispute that the work needs in Pasco were greater than in Connell, and he could not identify any information that indicated that he was sent to work in Pasco for anything other than legitimate work reasons. The Connell crew claimed that they began working in Pasco more often in 2000 or 2001, when Casey McGill was promoted to Assistant Regional Administrator. CP 843, 413. This occurred prior to Crownover’s complaint about Brewster in June of 2002. There are no facts linking the work in Pasco to Crownover’s complaint. CP 1362-1364.

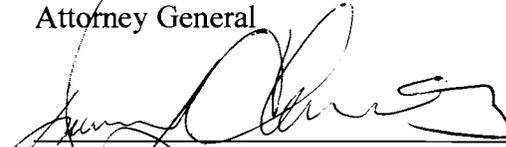
Although not asserted in his deposition, Crownover’s Opening Brief argues that he was denied a transfer to Washtucna as retaliation. Crownover testified that he was scheduled to interview for a transfer to Washtucna when he decided to accept the higher paying job in Houston and leave his employment with the DOT. CP 1354. Crownover decided not to go to the interview scheduled for the transfer to Washtucna. CP 1354. There is absolutely no evidence in this case of any retaliation, as correctly found by the trial court.

VI. CONCLUSION

Based upon the arguments as set out above, the trial court properly granted summary judgment dismissal of James Crownover's claims. The Department of Transportation respectfully requests the trial court decision be affirmed.

RESPECTFULLY SUBMITTED this 25th day of February, 2011.

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CERTIFICATE OF SERVICE

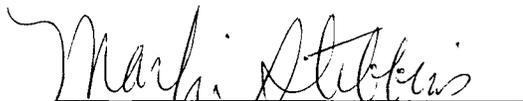
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding was hand delivered and filed at the following address:

Court of Appeals of Washington, Division III
500 North Cedar Street
Spokane, Washington 99201-2159

And that a copy of the same was served by First Class Mail on counsel for Plaintiff/Appellants at the following address:

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2415 West Falls Avenue
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DATED this 25 day of February, 2011 at Spokane, Washington.



MARKI STEBBINS
Legal Assistant