

NO. 29043-3-III

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

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

Appellants,

v.

THE STATE OF WASHINGTON,  
DEPARTMENT OF TRANSPORTATION,

Respondent.

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**RESPONDENT'S RESPONSE BRIEF FOR ROY GILLIAM**

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ROBERT M. MCKENNA  
Attorney General

AMY C. CLEMMONS,  
WSBA No. 22997  
Assistant Attorney General  
Attorneys for Defendants State of  
Washington, Department of  
Transportation  
1116 West Riverside Avenue  
Spokane, WA 99201

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Attorneys for Defendants State of  
Washington, Department of  
Transportation  
1116 West Riverside Avenue  
Spokane, WA 99201

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## I. INTRODUCTION

ROY GILLIAM ("Gilliam") asserts claims for hostile work environment sexual harassment and for retaliation. Gilliam was an employee of the Department of Transportation ("DOT") who admits that he was never subject to any conduct based upon his gender or sex. He claims that he felt his environment was hostile because he had personality conflicts with a co-worker and supervisor. He also states that his co-workers heard jokes or comments that they found offensive. He admitted that he was not offended by any of the jokes or comments, and he further admitted that he is not aware of any comments or conduct of a sexual nature occurring within the statute of limitations.

In 2004 to 2005, Gilliam started his own business and worked full time at that business while he took sick leave from DOT. After exhausting his sick leave, he quit his employment with DOT to continue running his own business. Gilliam testified that he was not aware of any manager at DOT targeting him or taking any adverse employment action against him.

Mr. Gilliam's deposition testimony clearly acknowledges that he was never subjected to any sexual harassment or retaliation. His affidavit attempting to contradict his deposition testimony with general conclusory allegations failed to identify any facts that would defeat summary judgment. Gilliam's claims of hostile work environment based upon

gender were dismissed by the trial court because no conduct was alleged within the statute of limitations, and because the nature of the claims by Gilliam did not constitute gender discrimination. No admissible evidence supported his claim that he had been subjected to an adverse employment action. DOT respectfully submits that the trial court's summary judgment dismissal should be affirmed.

## **II. STATEMENT OF THE ISSUES ON APPEAL**

- 1. Whether Roy Gilliam's claim for hostile work environment was properly dismissed based upon the statute of limitations?**
- 2. Whether Roy Gilliam's claim for hostile work environment based upon gender was properly dismissed because no conduct was directed at Gilliam due to his gender?**
- 3. Whether Roy Gilliam's failure to engage in any protected activity prevents his claim for retaliation?**
- 4. Whether Roy Gilliam's claim for retaliation was properly dismissed based upon his admission that no adverse employment action was taken against him and his failure to identify any facts supporting his claim that an adverse action was related to a protected activity?**

## **III. STATEMENT OF THE CASE**

Roy Gilliam filed a Complaint on September 6, 2005, alleging he was subjected to a hostile work environment based upon his gender because he was subjected to "sexually engendered comments and behavior" during his employment with the Department of Transportation

(DOT). CP 1435 - 1437. Gilliam further alleges that he was subject to retaliation for reporting sexual harassment and for union activity. *Id.*

**A. Facts Relating to Gilliam's Claim for Hostile Work Environment Gender Discrimination.**

Gilliam admitted in his deposition on March 16, 2006 that "I have not been harassed sexually in any way" and he does not feel he has ever been sexually harassed. CP 1043, L. 15-17- CP 1046, L. 3-5, CP 1004.

Q. Did you feel that you personally have been sexually harassed?

A. No.

CP 1046, L. 3-5.

Gilliam received training on sexual harassment as an employee of the DOT. CP 1043, L. 3-14. He was aware that he should make reports if he was aware of that type of conduct. *Id.* Gilliam admitted that he never made a complaint that he was discriminated against because of his gender. CP 1043-1045.

Q. Did you ever make a complaint that you were discriminated against because of your gender, because you are male?

A. No.

Q. Are you making a complaint that you were discriminated against because of your gender now?

A. No.

CP 1044, L. 17-23.

Q. To your knowledge did anyone treat you unfairly because you are male?

A. No.

CP 1044, L. 24-CP 1045, L. 1. In addition, Gilliam was not present for and did not witness any of the alleged sexually inappropriate comments asserted by the other appellants in this action. CP 1045, L. 24-CP 1046, L. 2.

Gilliam testified that he feels a hostile work environment occurs where somebody “tries to not get along with another person” or has a personality conflict. CP 1047. He felt that well-liked employees were treated better. CP 1042. Gilliam did not like the way Mark Brewster and Tom Lenberg supervised people. CP 1041, L. 12-14. He admitted that the dislike did not occur for any reason other than personality. CP 1042, L. 17-24, CP 1048-1049. Gilliam’s claimed personality disputes include the following:

**1. Gilliam asserted a personality conflict with Mark Brewster.**

Mark Brewster and Roy Gilliam were both maintenance technicians at the same time, but in different shops. CP 846, 1059-1062. Gilliam worked in the Connell shop and Brewster worked at the Pasco shop. *Id.* They both became lead technicians in 2000.<sup>1</sup> *Id.*

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<sup>1</sup> Gilliam became a lead technician for the Connell shop on September 16, 2000, and Brewster became the lead tech for the Pasco shop on November 16, 2000. *Id.*

All of Gilliam's complaints against Mark Brewster relate to disagreements on work issues where he felt Brewster was "nitpicking" his work. CP 1047-1050. Brewster was described as being a perfectionist who was very good at his job and who had high expectations for the work. CP 1080. Gilliam complained that before 2000 Brewster described Gilliam as standing around to "take tickets" on a job site. CP 1047-1048. Gilliam testified that he felt like a "chihuahua" and Brewster was a "bulldog." CP 1048, L. 4-10.

In 2002, when Brewster had to work with the Connell crew, he described the Connell crew as lazy, expressed dissatisfaction with their work, and described them as a waste of breath. CP 345, 448, 450, 1080. Brewster also complained in the spring of 2002 that Jim Crownover, a maintenance tech on the Connell crew, was creating a hostile work environment based upon his behavior toward another employee.<sup>2</sup> CP 848, L. 2-4. In response to Brewster's complaint, the whole Connell crew met and made a documented list of any and all complaints they could against

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<sup>2</sup> DOT had an anti-violence policy and conduct referenced under that policy was referred to as creating a "hostile work environment." Crownover was using profanity and refusing to communicate with a fellow employee. The hostile work environment complaint by Brewster was referencing rude or hostile conduct that had nothing to do with discrimination.

Brewster. CP 304-305.<sup>3</sup> Gilliam did not have any complaints to add to the list. *Id.*

On September 18, 2003, two days after the Connell crew members presented their list of complaints, an OEO investigation was initiated. CP 1065. All of the maintenance technicians from both the Pasco and Connell shops were interviewed.<sup>4</sup> CP 1065-1082. Only the three Connell crew members, Havlina, Crownover, and Delgado reported complaints of alleged sexual comment, and they collectively identified several sporadic comments occurring over the past decade. CP 1065.<sup>5</sup> Gilliam testified that sexually engendered comments and jokes were not uncommon amongst the all male Connell crew in the 1990's, and no one seemed

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<sup>3</sup> The Connell crew consisted of Roy Gilliam, lead tech, and five maintenance technicians, Joel Havlina, Jim Crownover, Harold Delgado, John Herron and Max Yager. CP 844.

<sup>4</sup> All eleven of the maintenance technicians in Pasco who worked with Brewster on a daily basis were interviewed in the 2003 OEO investigation, and all of them "indicated that they have not heard Mr. Brewster make comments of a sexual nature." CP 1080. Only the three Connell crew members, Havlina, Crownover, and Delgado, made complaints of sexual comments. CP 1065. The other three Connell crew members never heard any sexual comments. CP 1080.

<sup>5</sup> Crownover reported hearing one comment in 2000. CP 1065-1082. Delgado mutually participated in two to four joking exchanges in 2000. *Id.* Havlina reported that Brewster used the "F" word, and that between 1990 and 2001 that Havlina heard Brewster make four to six comments with some form of a sexual reference. *Id.*

offended.<sup>6</sup> CP 1035-1036. Gilliam was interviewed twice, and he did not report any allegations of any alleged sexual or gender related conduct. *Id.*

Julie Lougheed, the OEO investigator, encouraged the complainants to report everything in the 2003 OEO investigation. CP 1246, L. 8-10.<sup>7</sup> All of the complainants admitted that the alleged sexual comments or conduct stopped in 2001, outside of the statute of limitations.<sup>8</sup> CP 1066, CP 1253, L. 14-15, CP 304-305, CP 1065-1082, 1352.

Gilliam admits that he exhausted all of his complaints in the documentation. CP 339, L. 22 – CP 340, L. 3; CP 514, L. 22-25. Gilliam never reported or documented any complaints of sexually engendered comments or conduct by Brewster (or anyone else employed by DOT) directed at him or occurring in his presence. CP 1065-1082, CP 514,

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<sup>6</sup> Witnesses reported in the OEO investigation that Havlina, Delgado and Crownover all used foul language and made crude jokes or comments. It was more of a mutual exchange and was “in fun, just construction talk.” CP 1069, 1073, 1077-1078, CP 1081 (and that “things were different 10 years ago.”).

<sup>7</sup> The complainants asserted that all complaints were reported to Julie Lougheed, the OEO investigator. CP 339, L. 22 – CP 340, L. 3; CP 514, L. 22-25. CP 513.

<sup>8</sup> DOT began training in 2000 to clean up construction talk within DOT, and inform employees that it would not be tolerated. Delgado admitted that after the mutual joking exchange in 1999 with Brewster regarding a blow job “that he never did say that to me again.” CP 1253, L. 14-15. Crownover does not allege any comments or conduct of a sexual nature other than one comment in the fall of 2000. CP 1352, L. 19-25. Havlina, Crownover and Delgado all told Lougheed that the comments stopped in 2001. CP 1078.

L. 22-25. Gilliam did allegedly witness Brewster use the “F” word once in the early 1990’s. CP 1073.

Within the statute of limitations period, between 2002 and 2006, Gilliam testified that the only conflict he had with Brewster was on the last day of Gilliam’s employment, in January 2006. CP 504, CP 1016, CP 1053-1054. As Gilliam was leaving the lead tech position in Connell, Brewster commented that having to do the Connell schedule was a “thorn in his side.” *Id.* Gilliam did not appreciate or like the comment. *Id.*

**2. Gilliam was never offended by jokes told by Max Yager.**

Gilliam testified that the all male Connell crew exchanged jokes with a sexual reference, and no one on the Connell crew ever seemed offended by these types of jokes or comments. CP 1035-1036, CP 513. The comments occurred between men because they worked with 99% men. CP 1046, L. 22-25. Max Yager who was a maintenance technician on the Connell crew, led by Gilliam, was known as a jokester. CP 513, 408, 410.

Gilliam worked with Max Yager through the 1990’s and up to 2004. CP 840, 844. Gilliam can only recall Max Yager telling two jokes which were “off-color” because of race or sex, and Gilliam testified that he personally did not find the jokes offensive. CP 1031, 1051. In

reference to hearing the jokes, Gilliam testified: “Offensive? No. But just something you didn’t say in the workplace.” CP 1031, L. 12-13.

Gilliam testified that he was never offended by Max Yager’s jokes.

CP 1051.

Q. Were you ever offended by Mr. Yager where you wanted to see some action taken against Mr. Yager?

A. No. Max was very careful not to say something that would be very offensive when I was around, especially after I became lead tech [in March 2000].

CP 1051, L. 18-22, CP 1059-1060.

After providing the above sworn deposition testimony on March 16, 2006, Gilliam provided an affidavit signed on December 3, 2007, in opposition to summary judgment dismissal, contradicting his deposition testimony. CP 1004, CP 856. Gilliam’s affidavit stated: “One of the Connell crew members was Max Yager. Max Yager told offensive and rude jokes, some which were sexist and racist in nature.” CP 844, L. 14-16. In the affidavit, Gilliam identified hearing two jokes by Yager referencing Mexicans or Hispanics and one referencing African-Americans. CP 844, L. 20-845, L. 11. Gilliam claimed in the affidavit that the joking reference to Hispanic women was offensive. *Id.* Gilliam noted that the joking reference to Hispanic women occurred before he became a lead tech in 2000. CP 845, L. 3-5. Gilliam acknowledged in the

affidavit that the jokes had not been reported to management. CP 845, L. 5.

In 2002, when the supervisor, Tom Lenberg, became aware of the allegation that Max Yager made a few “off-color” jokes, he took them seriously and gave Yager a written reprimand. CP 1032. Yager stopped, and there were no additional complaints raised or initiated against Yager relating to inappropriate jokes or comments.<sup>9</sup> CP 1033-1034. Gilliam never witnessed any off-color comments or jokes by Yager after the March 2002 reprimand. CP 1034. Gilliam testified that all the alleged inappropriate comments reported to be made by Max Yager were before his reprimand in March 2002. CP 1034, L. 17-21.

**B. Facts Relating to Gilliam’s Claim for Retaliation.**

**1. Gilliam was present when other Plaintiffs complained about comments of a sexual nature that occurred before November 2000.**

Gilliam admits that he never personally made a complaint of discrimination or sexual harassment, but he claims he was present at the September 16, 2003, meeting when Havlina, Crownover and Delgado (all members of the Connell crew) reported that Mark Brewster made inappropriate comments. CP 1065, 1045-1046.

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<sup>9</sup> Joel Havlina complained in March of 2002 about Max Yager farting near his face. CP 1033-1034.

**2. No Adverse Employment Action Was Taken.**

Gilliam testified in his deposition that he never had any negative employment action taken against him, other than one write up for a safety violation. CP 1055. There was never any action taken to affect his pay. CP 1056. There was no change in his duties. *Id.*

Q. Did anyone above you in management ever take any action that changed the duties assigned to you in a negative way? In other words, you were assigned duties you didn't like?

A. That came with the territory, of being a lead tech, giving orders that you had to pass on to the crew. But if you are asking for specifics, I don't have any.

Q. Nothing that changed at any point in time?

A. No.

Q. Just the normal duties.

A. Right.

CP 1056, L. 12-23.

Furthermore, Gilliam did not feel management was targeting him in a negative way. CP 1057.

Q. At any point in time do you feel some management personnel was targeting you in a negative way for any reason?

A. Hmm. I don't have anything that comes to mind right now.

CP 1057, L. 1-5.

Q. Okay. Other than the personality conflict with Mr. Lenberg, do you feel someone in management treated you unfairly?

A. Hmm. Not as an individual, no.

CP 1057, L. 6-9.

Gilliam did get a written reprimand from Tom Lenberg on May 2, 2005, for a safety violation relating to traffic control on a burn job where he was the designated lead tech. CP 1084, CP 1037. Gilliam testified that he had a doctor's appointment and would not be there, and he was directed by Tom Lenberg to get the crew "lined out before you go." CP 1037, L. 18-19. One of the criticisms was Gilliam was lax on traffic safety and Gilliam wanted a different traffic control standard in Connell indicating that traffic control "was more relaxed in Connell." CP 1084, 1037-1040. Lenberg was strict on safety and traffic issues because he was new to the job, and wanted all policies followed even in light traffic areas like Connell. *Id.*

The placement of the proper signs, which is extremely important with a burn, is a crucial safety issue, and it was not disputed that the proper signs were not placed, therefore creating a safety hazard. CP 1038. Gilliam thought because he was not present on the job site because of his doctor's appointment that he shouldn't get a reprimand, but he was advised that he was the lead tech responsible for lining out or arranging the work plan which includes the sign placement and making sure it is done properly. CP 1039. Gilliam did not put anyone in charge in his absence. CP 1039.

Gilliam agrees that a safety violation warrants a written reprimand.

*Id.* Lenberg advised Gilliam that as lead tech, he was the responsible supervisor. CP 1039. Gilliam testified that he received the discipline on this issue from Lenberg because Lenberg wanted to be firm on safety issues. CP 1040.

Q. So you think Tom wanted to be firm on these issues because he was newly promoted and wanted to set a tone that he was not going to tolerate this type of behavior?

A. Yes.

CP 1040, L. 8-14. When asked if there was any reason for the discipline other than Lenberg being firm on safety violations, Gilliam testified "I have none." CP 1040, L. 15-17.

Gilliam's performance evaluations are in writing, and the evaluations from 2000 until his resignation are consistent. CP 516-523. Gilliam admitted in his deposition testimony that his evaluations were consistently low and did not change. CP 507-508.

**3. Gilliam voluntarily left his work with DOT in 2006 to start his own business.**

Gilliam began to look for alternative work outside of DOT in December 2003. CP 1005. He started to purchase his own business, a Mini-Mart, in April 2004. CP 1005-1006. Gilliam's agreement to purchase the Mini-Mart closed on May 7, 2004, and Gilliam began working at the Mini-Mart on a regular basis on that date. CP 1006.

Initially, Gilliam was still working 40 hours a week at DOT in Connell and worked at the Mini-Mart from 5:00 p.m. to 10:00 p.m. seven days a week. CP 1007.

In about June of 2004, he decided that he would leave his employment with DOT to work exclusively at the Mini-Mart. CP 1008. He got a doctor's note asserting that he needed to be off work at DOT due to anxiety, depression, and high blood pressure and used that note to exhaust all of his leave at DOT while he worked at the Mini- Mart. CP 1008. Gilliam worked full time at the Mini-Mart while he was on medical leave from DOT. CP 1011-1012. Gilliam gave notice of his resignation on January 3, 2006, officially resigning on January 17, 2006 after exhausting all of his leave. CP 1008.

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

In an affidavit in opposition to summary judgment Gilliam makes various miscellaneous assertions.

**1. Before February 2000, Gilliam claims the prior Connell lead tech Jim Leroue had an angry personality.**

The Connell DOT shop was generally staffed with one lead tech and four to six maintenance workers. Prior to Roy Gilliam becoming the lead tech at the Connell shop on September 16, 2000, Jim Leroue was the

lead tech at Connell. CP 1059-1060, 1021. Gilliam testified in his deposition that Jim Leroue, due to his personality, was prone to angry outbursts with everyone. CP 1019-1025. Gilliam had no individual complaints against Leroue, but the Connell crew did because Leroue would get angry at them over work related issues. CP 1026, CP 401-406. Gilliam stated that because of the potentially fatal illness of his granddaughter, Leroue was under a great deal of stress. CP 1027. Gilliam was friends with Leroue at the time, but just thought Leroue was not a good supervisor when under stress. CP 1023-1024. Gilliam admits that the problems with Leroue were caused by Leroue's personal problems and his personality, nothing else. CP 1028. 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.<sup>10</sup>

Gilliam and other members of the Connell crew complained about Leroue having angry outbursts over work-related issues. CP 1025. Leroue was counseled about the conduct, but when his angry outbursts allegedly continued, he was removed from his position in Connell in February 2000. *Id.* The only contacts Gilliam had with Leroue after February 2000 were friendly visits with him at the Mini-Mart. CP 1025.

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<sup>10</sup> The Court asked in reference to Leroue: I don't think any of these constituted either sexual or racial comments of any kind. We're talking about Mr. Leroue now? Mr. Fearing: Correct. That would be correct. RP (January 15, 2008), p. 29, L. 3-6.

**2. Mike Kukes called the Connell crew lazy between 1999 and February 2001.**

Gilliam asserts that when Mike Kukes was their supervisor, he called the Connell crew “whiners” and “waterasses” (meaning lazy). CP 849, L. 103. Mike Kukes was no longer the supervisor as of February 2001 when he was replaced by Tom Lenberg. CP 542, L. 6-13; CP 686-687. Kukes does not dispute calling the Connell crew lazy when he was their supervisor. CP 681.

**3. Tom Root questioned Gilliam about why he left the gate open at the Connell shop.**

Tom Root talked to Gilliam about leaving the gate open at the Connell shop, which created a security concern since equipment, and tools were kept there. Gilliam testified that there was nothing inappropriate about Root addressing the gate being left open.

Q. Did you think there was anything inappropriate about Mr. Root addressing the gate issue with you?

A. No.

CP 511, L. 25.

Gilliam further testified that “I had a fairly good relationship with Tom Root.... So I don’t have lots of complaints there.” CP 511, L. 12-15. Gilliam testified that his only concern with Root was back in 2000 when Root did not believe the Connell crew’s allegations against Jim Leroue. CP 511.

#### 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. There Are No Alleged Incidents of Gender Discrimination or Retaliation Within the Three-Year Statute of Limitations.**

Claims for discrimination and retaliation are subject to the general three-year statute of limitations of RCW 4.16.080(2). *Antonius v. King County*, 153 Wn.2d 256, 261-262, 103 P.3d 729 (2004). Gilliam admits that there was never any sexual or gender related conduct directed at him. He asserts that he became aware of alleged sexually engendered comments

and conduct asserted by other plaintiffs, all of which occurred outside of the statute of limitations.

Gilliam filed suit on September 6, 2005. He admitted that he could not identify any objectionable conduct directed at him between 2002 and 2006. There is no question that the law requires some of the alleged acts directed at the particular plaintiff to occur within the statute of limitations in order for the claim to be timely filed. *Antonius*, 153 Wn.2d at 263-264; *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 117, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).

Gilliam claims in his opening brief that Brewster made a comment about not believing in mixed marriages in 1996 and made a comment that Gilliam should get his ass in the truck in the spring of 2002. Gilliam admits that there was no gender related conduct, but in any event the allegedly offensive comments were outside of the three year statute of limitations.

Gilliam clearly testified that the only conflict he had with Brewster between 2002 and 2006 was that on Gilliam's last day of work, Brewster commented that having to deal with the Connell schedule was a "thorn in his side."

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. And if there is no relation, or 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' as part of one hostile work environment claim."

*Antonius*, 153 Wn.2d at 271 (quoting *Morgan*, 536 U.S. at 118).

The comment that the schedule is a thorn in his side is not related to any alleged discriminatory motive. This innocuous comment in 2005 does not identify any sexual harassment or retaliation within the statute of limitations. Gilliam testified that he was never subjected to any sexual harassment or gender related conduct. CP 1043-1046. There is no relation between this 2006 comment about the schedule and any alleged act of discrimination. 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]." *Morgan*, 536 U.S. at 118.<sup>11</sup> Gilliam fails to identify any discriminatory conduct within the statute of limitations.

**B. Gilliam Admittedly Has No Claim For Gender Discrimination.**

To establish a hostile work environment claim based on sexual harassment, an employee must prove the following: (1) the action was

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<sup>11</sup> "On the other hand, if an act on day 401 had no relation to the acts between days 1-100, or for some other reason, such as certain intervening action by the employer, was no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts, at least not by reference to the day 401 act." *Morgan*, 536 U.S. at 118. If "any act falls within the statutory time period," we need "to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice." *Id.* at 120.

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 sexual comments or jokes were not unwelcome to Gilliam**

Gilliam was not present for any alleged sexually engendered comments or conduct reported as being allegedly offensive by other plaintiffs. Gilliam testified that sexual jokes and comments among the all male crew were not uncommon, and no one seemed offended. He further testified that he was never offended by any jokes or comments by Max Yager, and that he never witnessed any sexual comments or conduct by Mark Brewster. CP 514, 1035-1036, 1051, 1059-1060.

Gilliam asserts in an affidavit he filed in opposition to summary judgment that he heard one joke by Max Yager before 2000 in reference to Hispanic women that was offensive. CP 845, L. 1-2. This affidavit contradicts Gilliam's deposition testimony where Gilliam clearly stated that he was not offended by any of Max Yager's jokes or comments. CP 1051, 1059-1060.

**2. Gilliam acknowledges that there was no harassment based upon gender.**

The Plaintiff must prove the alleged conduct was motivated by gender. RCW 49.60.180(3) provides, in relevant part:

It is an unfair practice for any employer ... {t}o discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability.

Hostile work environment sexual harassment is a form of gender discrimination and requires the plaintiff to prove the conduct occurred because of the plaintiff's gender. *Glasgow*, 103 Wn.2d at 405; *Kahn v. Alerno*, 90 Wn. App. 110, 118-119, 951 P.2d 321, review denied, 136 Wn.2d 1016, 966 P.2d 1277 (1998); *Campbell v. State*, 129 Wn. App. 10, 19, 118 P.3d 888 (2005). See also *Payne v. Children's Home Soc. of Washington, Inc.*, 77 Wn. App. 507, 514, 892 P. 2d 1102 (1995); *Schonauer v. DCR Entertainment, Inc.*, 79 Wn. App. 808, 820, 905 P.2d 392 (1995); *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). The employee has the burden of producing competent evidence that gender was the motivating factor for the harassing conduct. *Doe v. State, Dept. of Transp.*, 85 Wn. App. 143,

149, 931 P.2d 196 (1997). “Sex” in the context of a discrimination claim refers to gender, not just activity of a sexual nature generally. *Id.*

“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*, 77 Wn. App. 507; *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). 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. *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). When the evidence does not support the conclusion that the conduct was motivated by gender, summary judgment is warranted. *Payne*, *supra*.

Specifically, when the conduct complained of is “in the nature of a personality conflict” it “does not constitute harassment as a matter of law.” *Payne*, supra at 513; *Vasquez v. County of Los Angeles*, 349 F.3d 634, 654 (9th Cir. 2003) (“It is beyond dispute that a personality conflict is insufficient to trigger the protections of Title VII.”); *Vore v. Indiana Bell Telephone Co., Inc.*, 32 F.3d 1161, 1162 (7th Cir. 1994) (personality conflicts are not Title VII discrimination).

Here, Gilliam admits he was not targeted because he was a male and that he was never subjected to any sexual harassment. He worked in an all male environment, where occasional jokes were not uncommon.<sup>12</sup> He did not relate the occasional jokes to gender, and he does not identify any jokes or comments directed at him. The individual accused of creating a hostile work environment, Mark Brewster, never engaged in any sexual conduct or comments in front of Gilliam or directed at Gilliam.

Gilliam admits his problems were work related issues related to personality differences. Gilliam very frankly admits that he was never sexually harassed or discriminated against because of his gender. Therefore, summary judgment dismissal is required as a matter of law.

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<sup>12</sup> In 2000, DOT provided training to educate all employees that certain conduct was not acceptable in the workplace.

**3. There was no severe and pervasive conduct directed toward Gilliam.**

Any sexual harassment must be “sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment” based upon “the totality of the circumstances.” *Glasgow*, 103 Wn.2d at 406-07. The totality of the circumstances includes taking into consideration the frequency and severity of the conduct and whether the conduct involved words alone or whether it also included physical intimidation. *Glasgow*, 103 Wn.2d at 406-07; *Adams*, 114 Wn. App. at 296-97. “The conduct must be both objectively abusive (reasonable person test) and subjectively perceived as abusive by the victim.” *Id.* at 297. It cannot be merely ‘Casual, isolated or trivial manifestations of a discriminatory environment [that] do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law.’ *Glasgow*, 103 Wn.2d at 406.

The courts should “filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” *Jernigan v. Alderwoods Group, Inc.*, 489 F. Supp. 2d 1180, 1199 (D.Or. 2007), citing, *Jaurrieta v. Portland Public Schools*, 2001 WL 34041143 at \*8 (D.Or. 2001), quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118

S. Ct. 2275, 141 L. Ed. 2d 662 (1998). A civil rights code is not a “general civility code.” *Adams*, 114 Wn. App. at 296-297, citing, *Faragher*, 524 U.S. at 788 (quoting *Oncale*, 523 U.S. at 81) (“The conduct must be so extreme as to amount to a change in the terms and conditions of employment.”). Merely offensive conduct is insufficient to identify a hostile work environment claim. *Washington v. Boeing Co.*, 105 Wn. App. 1, 10-11, 19 P.3d 1041 (2000). Conduct that is hostile and intimidating, without more is not actionable as sexual harassment. See e.g. *Miller v. Aluminum Co. of America*, 679 F. Supp. 495, 502 (W.D.Pa. 1988) (“Hostile behavior that does not bespeak an unlawful motive cannot support a hostile work environment claim.”), *aff’d*. without opinion, 856 F.2d 184 (3d Cir. 1988).

The law is intended to filter out claims exactly like this one. Gilliam had normal work related disputes that he categorizes as “hostile,” but that he also openly acknowledges had nothing to do with discrimination. Within the statute of limitations, the only conduct he identifies as offensive, directed at him, was a comment by Brewster on his last day of employment that Brewster found taking over the Connell schedule to be a “thorn in his side.” CP 504, 1054.

Gilliam admits he was not offended by, subjected to, or aware of any offensive sexual harassment. “I have not been harassed sexually in

any way.” CP 1043, L. 15-17- CP 1046, L. 3-5. He cannot meet either the subjective or objective standard that any discriminatory conduct rose to the level of severe and pervasive sufficient to impact the terms and conditions of his employment. He simply identifies some trivial work interactions that are not actionable.

**4. The conduct cannot be imputed to the employer.**

To impute liability to an employer for a co-worker’s actions in a hostile workplace claim pursuant to RCW 49.60, *et seq.*, the plaintiff has the burden of proving that the employer “(a) authorized, knew, or should have known of the harassment, and (b) failed to take reasonably prompt and adequate corrective action.” *Herried v. Pierce County Public Transp. Benefit Auth. Corp.*, 90 Wn. App. 468, 474, 957 P.2d 767 (1998) (quoting *Glasgow*, 103 Wn.2d at 407). Gilliam took part in two OEO investigations, one in 2000 regarding Jim Leroue’s anger, and one in 2003 relating to other individuals’ claims against Mark Brewster. Gilliam never reported any alleged discriminatory conduct or offensive sexual conduct. Therefore, Gilliam fails to meet the knowledge requirement.

Even if knowledge could be established by the other individuals’ complaints in the 2003 OEO investigation, liability cannot be imputed to an employer who acts promptly with investigations and recommendations reasonably calculated to resolve the conflicts. *Herried*, 90 Wn. App. at

475. It is undisputed that the complaints by other individuals were investigated and corrective action was taken. It is undisputed from Gilliam's testimony that he was not aware of any offensive sexual comments or conduct occurring after the disciplinary action. None of the alleged offensive conduct involved Gilliam or was directed at him. Gilliam does not identify any facts that the employer knew of some alleged gender discrimination directed at him.

Gilliam blatantly fails to meet his burden of proof on any of the required elements of a hostile work environment sexual harassment claim. The failure to meet any one of them is fatal. Gilliam's own admissions undoubtedly demonstrate that summary judgment dismissal is warranted.

**C. Gilliam Fails 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).

**1. Gilliam never engaged in any protected activity.**

In determining whether an employee’s activity is protected, the court will “balance the setting in which the activity arose and the interests and motives of the employer and employee.” *Kahn*, 90 Wn. App. at 130 (citing *Coville*, 73 Wn. App. at 439. An employee’s decision to report a hostile work environment is a statutorily protected activity. *Campbell*, 129 Wn. App. at 22. The plaintiff must prove that he or she reasonably believed that the employer’s conduct was unlawful discrimination. *Coville*, 73 Wn. App. at 440; *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000).

Gilliam admits that he never complained of any unlawful discrimination. He became aware through hearsay that other employees

were reporting some inappropriate comments or jokes. Gilliam was interviewed several times by the OEO and never reported any alleged sexual harassment or discriminatory conduct.

**2. No adverse employment action was taken.**

Even assuming that Gilliam attending a meeting where other plaintiffs reported sexual jokes or comments could constitute a protected activity, there is no retaliatory adverse employment action taken against Gilliam by DOT. Gilliam must prove an actual adverse employment action was taken based upon a retaliatory motive.

Washington's law prohibiting retaliation provides that it is an unfair practice for an employer to "discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding." RCW 49.60.210. An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. *See* 1 B. Lindemann & P. Grossman, *Employment Discrimination Law*, 669 (3d ed.1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "snubbing' by supervisors and co-workers" are not actionable.) Some

actual adverse employment action other than normal work tribulations needs to be established.

An adverse employment action “must involve a change in employment conditions” ... “such as reducing an employee’s workload and pay.” *Tyner v. State*, 137 Wn. App. 545, 564-565, 154 P.3d 920, 929 (2007). In this case, the plaintiff admitted that he did not suffer any “unfair treatment”...“other than the personality conflicts” which existed throughout his employment. CP 1057. Gilliam could not identify any negative employment action in his sworn deposition testimony. CP 1055-1057. Gilliam admits there was no change in his duties, and he did not feel management was targeting him in a negative way. *Id.* Although Gilliam asserts in a self-serving affidavit that his performance evaluations were low, he admitted in his deposition that his evaluations were always low, and that there was no change in the evaluations at any time. CP 507-508.

**3. The only employment action taken against Gilliam was a reprimand that was related to an undisputed safety violation.**

Gilliam admits that the burn job was not properly signed which was a safety violation. He further admitted that Lenberg directed him to make sure the job was properly signed before Gilliam went to the doctor’s appointment. Gilliam simply argues that since he left the job site to go to

a doctor's appointment that he did not think he should be responsible. However, he clearly admits that the reprimand was an appropriate response to a safety violation, and that the only motivation for the reprimand was the safety violation. Gilliam admits Lenberg was strict on safety issues, and there was no other reason for the discipline. CP 1040.

Once an employer establishes a legitimate reason for employment action, the plaintiff must produce evidence that an employer's non-retaliatory explanations for its employment decisions were a pretext. *Milligan*, supra at 638. Conclusory statements do not satisfy this factual burden. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

In this case, Gilliam only provides an affidavit contradicting his deposition testimony by generally asserting that he suffered unspecified retaliation. He fails to identify the protected activity, who took the alleged retaliatory action, when it was taken or any facts that would link it to a protected activity. Gilliam's deposition testimony is clear that he was never targeted in a negative way by any management. CP 1056-1057. The only discipline or negative employment action identified by Gilliam as occurring within the statute of limitations is the reprimand for his violation of a safety requirement. Gilliam admitted that the only motivation for the reprimand was the fact that a safety violation occurred

and his supervisor was strict on safety issues. Therefore, the trial court correctly found that Gilliam failed to identify any facts to support a claim for retaliation.

**D. Gilliam Cannot Contradict His Own Sworn Testimony in an Effort to Create an Issue of Fact.**

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. No. 2*, 94 Wn. App. 911, 918, 973 P.2d 1098 (1999).

Gilliam testified that he was not exposed to any sexually offensive comments or to any sexually harassing conduct, or any discrimination based upon his gender. CP 1043-1046. He admitted that he was not offended by any comments or jokes made by Max Yager. CP 1051, 1059-1060. Gilliam’s affidavit in opposition to summary judgment contradicting this testimony by generally claiming offense to one joke before 2000 (CP 845, L. 1-2) cannot prevent summary judgment. Gilliam

is bound by his clear deposition testimony that he was never exposed to sexual harassment. CP 1043-1046, CP 1059-1060.

Gilliam testified under oath that the only comment he could identify any objection to between 2002 and 2006 was Mark Brewster's comment that having to do the Connell schedule on top of his own Pasco schedule was a thorn in his side. He cannot alter his testimony in an effort to avoid summary judgment.

Similarly, in an affidavit in opposition to summary judgment, Gilliam makes a bald assertion that he was retaliated against without any identified facts relating to the adverse employment action taken, who took it, or how it is related to any protected activity. CP 855, L. 6-7. This contention is in direct conflict with Gilliam's deposition testimony that no manager took any adverse action against him. Gilliam admitted that: (1) he was never singled out unfairly by management; (2) he could not identify any management personnel targeting him in a negative way; and (3) he could not identify any action that changed his job duties or affected his ability to do his job. CP 1056-1057. Gilliam agreed that any work performance issues addressed with him were addressed appropriately. CP 1037-1040, 511. Gilliam cannot avoid summary judgment with a self-serving conclusory assertion in an affidavit that contradicts his prior sworn testimony. In addition, Gilliam cannot alter his unambiguous and clear

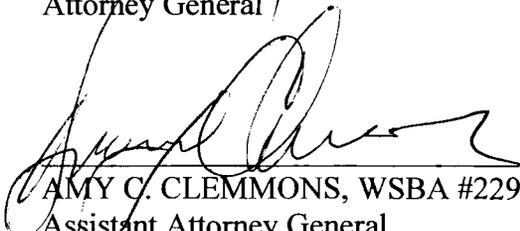
prior sworn testimony in order to avoid summary judgment. The trial court properly dismissed Gilliam's claim of retaliation.

## VI. CONCLUSION

Gilliam tries to throw out hearsay assertions made by other plaintiffs in an effort to create a smoke screen to try to avoid summary judgment. Gilliam fails to meet his burden to identify any conduct directed at him because of his gender within the statute of limitations. He admits that he was never treated differently because of his gender. He also fails to meet his burden to prove that he engaged in a protected activity, or that any identified adverse employment action was motivated by retaliation. A blatant conclusory assertion alone cannot prevent summary judgment dismissal. Based upon the arguments as set out above, the trial court properly granted summary judgment dismissal of Gilliam's claim for sexual harassment and retaliation. The Department of Transportation respectfully requests the trial court decision be affirmed.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of February, 2011.

ROBERT M. MCKENNA  
Attorney General

  
AMY C. CLEMMONS, WSBA #22997  
Assistant Attorney General  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

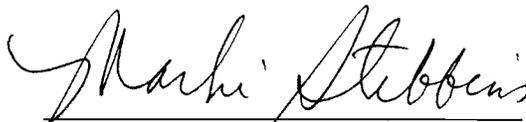
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding was hand delivered and filed at the following address:

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:

George Fearing  
Leavy, Schultz, Davis & Fearing, P.S.  
2415 West Falls Avenue  
Kennewick, WA 99336

DATED this 25 day of February, 2011 at Spokane, Washington.



MARKI STEBBINS  
Legal Assistant