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73521-7

CASE NO. 73521-7

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

CHRISTOPHER YOUNG,

Appellant

v.

KING COUNTY,

Respondent

CORRECTED APPELLANT'S OPENING BRIEF

On Appeal from the Superior Court of King County
Cause No. 13-2-32009-SEA
The Honorable Monica Benton

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Decisions of the Board of Industrial Insurance Appeals

Law Review Article

Schaefer, IntraGroup Discrimination in the Workplace: the Case for Race Plus

5 Harv.C,R-C.L.L. Rev. 57 (2010).....2

I. INTRODUCTION AND SUMMARY OF ARUMENT

This appeal presents the unusual context where an employee alleges discrimination by members of his own protected class. This form of "intra-group" discrimination has been recognized by the United States Supreme Court as early as 1998 in *Oncale v. Offshore Svcs., Inc.,* 53 US 75, 118 S.Ct. 998, 1001, 140 L.Ed.2d 201 (1998). In allowing a claim for male-on-male sexual harassment, the High Court noted:

> ..... [I]in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race. 'Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.'"

Id. (quoting *Castaneda v. Partida*, 430 U.S. 482, 499, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).[1]

A career employee of King County, Christopher Young (hereinafter "Young) has appealed because the trial court erred by dismissing at summary judgment his claim for damages from such conduct that violated the WLAD at RCW 49.60.180. Similarly, the Court erred in dismissing at summary judgment Young's claim that he was retaliated

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[1] *See also See*, e.g., *Walker v. Sec'y of Treasury,* 713 F.Supp. 403 (N.D.Ga. 1989) (finding discrimination against lighter-skinned black worker by

against in violation of the WLAD at RCW 49.60.210 because of his vocal opposition and complaints about such conduct to managers and Human Resources' officials. Young has produced sufficient admissible evidence that contradicts his employer's alleged legitimate basis for its actions. Thus, the true motives should be decided by a jury.

This appeal also presents the issue of whether, independent of the statutory claims above, Young has presented sufficient evidence that in its failure to adequately address and correct his supervisor's behavior, independent of any unlawful motive, he should have been able to present that claim to a jury of his peers as well.

A. Mr. Young's Claims Under RCW 49.60

In September 2013, Young filed the litigation below. Initially *pro se*, he raised claims under RCW 49.60, Washington Law Against Discrimination (hereinafter "WLAD") and the common law. He sought to remedy a pattern of discriminatory and abusive treatment by his former supervisor, B. Douglas Williams (hereinafter ("Williams"), also a Black male. The conduct included actual and threatened disciplinary actions and repeated efforts to challenge his work performance and conduct on the job. Most troubling, Williams engaged in physical and/or aggressive

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darker-skinned black supervisor) and Schaerer, IntraGroup Discrimination in the Workplace: the Case for Race Plus, 5 Harv. C.R.-C.L. L. Rev. 57 (2010)

confrontations on more than one occasion with Young in public settings and in the presence of coworkers and customers that that this level of aggression and scrutiny of work was visited on any Caucasian employees employed in similar positions under Williams's supervision.

The record before the trial court contains admissible evidence that managers and Human Resources (hereinafter "HR") within the County's Real Estate Services section and Facilities Management Division (hereinafter "FMD") were well aware of Williams' disparate treatment of Young and aware in many instances that his proposed discipline of Young could not be sustained. Young's reports to HR staff were viewed as disruptive. Only after Williams stopped supervising Young's work group and after another Black employee expressed concerns of race discrimination by Williams did the County initiate an investigation into Williams' actions. Both employees felt it was too little too late and soon thereafter Young filed the necessary tort claim and initiated this litigation *pro se* September 2013 and later retained his current counsel. [2]

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[2] After discovery revealed additional facts relevant to his WLAD claim, the Court also did not permit Young to amend his complaint to explicitly state claims for hostile work environment under these statutes. It also refused to consider an alternative cause of action for retaliation that his adverse treatment

B. Young's Common Law Claim of Negligent Infliction of Emotional Distress.[3]

As a result of Williams' behavior and physically threatening conduct and the County's failure to initiate sufficient actions to prevent that conduct from reoccurring, Young suffered objective symptoms of emotional distress, including anxiety, claustrophobia, and panic attacks, symptoms later diagnosed as consistent with Post-Traumatic Stress Disorder. (Hereinafter "PTSD") Because of their severity, he sought evaluation, treatment and was prescribed medication by his physician; he sought counseling from a private mental health professional. He reported these symptoms to County officials, health care providers and a private lawyer who also notified County HR personnel in the summer of 2012. Despite its agents' knowledge of this behavior, the County did not provide him provide him a safe work environment as the actions continued as late as October 2012. After denying the County's motion to dismiss this claim on summary judgment, the trial court subsequently erred as a matter of law by dismissing this claim for lack of jurisdiction or as preempted by the Industrial Insurance Act (hereinafter "IIA").

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was motivated by his prosecution of workers' compensation claim. The latter decision **is not a** basis of Young's appeal here.

[3] Young also initially filed common claims for assault and intentional infliction of emotional distress. Through counsel, he stipulated to the dismissal of those claims; as such, dismissal of those claims is also not a basis for this appeal

This Court should reverse these dismissal decisions and remand this complaint to the Superior Court with instructions to permit filing of an amended complaint with further discovery as necessary to address Young's amended complaint.

II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in not permitting Mr. Young to amplify his causes of action and amend his previous pro se complaint to state additional conduct in his workplace since September of 2013 when there was no substantial evidence of undue delay, undue prejudice or futility.

2. The trial court erred to the extent that its denial of Young's motion to amend his complaint was based on his failure to file an amended tort claim under the amended version of RCW 4.96.020(4).

3. The trial erred in dismissing Young's cause of action for race discrimination in the terms and conditions of his employment under RCW 49.60.180 on the County's motion for summary judgment.

4. The trial court erred in dismissing Young's cause of action for retaliation in the terms and conditions of his employment under RCW 49.60.210 on the County's motion for summary judgment.

5. The trial court erred a matter of law in concluding that it lacked jurisdiction over Young's complaint of negligent infliction of emotional distress after its prior ruling permitting a trial of this cause of action.

6. The trial court erred as a matter of law to the extent that it concluded as a matter of law that Young's cause of action for negligent infliction of emotional distress was preempted by the Industrial Insurance Act.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

Issue Related to Assignment of Error 1

Under CR 15(b) and (d) did the trial court abuse its discretion in denying Young's motion to explicitly state a claim for hostile work environment based on the same events giving rise to the original complaint when there was evidence demonstrating that the County consented to the cause of action through its discovery and litigation conduct prior to the conduct and no undue prejudice would result?

Issue Related to Assignment of Error No. 2

Under RCW 4.96.020, is a public employee required to file an additional tort claim under RCW 4.96.020 before seeking to amend a complaint to address additional facts and theories of relief?

Issue Related to Assignment of Error No. 3

Under CR 56, did the trial court err in granting the County's motion for summary judgment on Young's race discrimination claim under RCW 49.60.180 when the record contained admissible evidence of adverse actions that a jury could find were substantially motivated by Young's race including but not limited to the following:

> a. Williams discredited him and another senior Black coworker about their experience and expertise while supporting hiring of inexperienced Caucasian employees;
> b. Williams changed Young's work assignments and provided those assignments to Caucasian new hires but did not permit

Young to train them despite acknowledging his own lack of knowledge and Young's expertise in these subject;
c. Williams scrutinized Young's use of time and work product through frequent emails and other invasive methods including toleration of a coworker's creation of a log of Young's actions during his work day unlike his supervision of Caucasian employees;
d. Williams reprimanded Young for partial day absences, abusing his exempt status by not maintaining a regular schedule when past practice in the FMD was to permit flexible scheduling by exempt employees; and
e. Williams initiated formal investigation requests of Young's behavior and/or conduct but did not do so for least one other Caucasian employee he believed had committed misconduct?

Issues Related to Assignment of Error No. 4

Under CR 56, did the trial court err in granting the County's motion for summary judgment on his claim under RCW 49.60.210 when the record contained evidence of adverse actions that a jury could find were substantially motivated, by his opposition to the disparate treatment of him when:

a. Young experienced more scrutiny, threats and confrontative behavior from Williams after reporting and requesting intervention on the disparate treatment of him by his second level managers and HR;
b. That manager discouraged Young from use of the Division's Human Resources staff to address his complaints;
c. Young reported intimidating conduct by Williams r verified by others but was still disciplined and viewed as disruptive; and
d. Following his initiation of this litigation, without his knowledge, Young's was investigated further to develop evidence to support the County's legal defense?

Issues Related to Assignment of Error Nos. 3 and 4

Under CR 56, did the trial court err in dismissing Young's alternative theory of hostile work environment because of his race and good faith opposition to racially-motivated conduct when the record contained evidence that:

a. Young reported a pattern of unsolicited and unwelcome conduct of his supervisor to HR and upper management;
b. the conduct was objectively and subjectively severe enough to affect his working conditions, was physically intimidating;
c. a jury could find from the totality of the circumstances was substantially motivated by Young's race and/or his protected conduct;
d. The County took inadequate corrective action to deter or prevent further unwelcome conduct by Williams?

Issues Related to Assignment of Error No. 5

Did the trial court err of law in dismissing Young' negligent infliction of emotional distress after it had ruled there were genuine issues of material fact to be reserved for trial and implicitly concluding that:

a. the County had a duty to maintain a safe workplace for Young;
b. Young produced evidence from which a jury could conclude that agents of King County knew his emotional distress was proximately caused by the physically intimidating, bullying and threatening conduct of Williams and/or its negligent response to that conduct; and
c. Young produced evidence from a jury could find that it was reasonably foreseeable that Young would continue to experience significant emotional distress from exposure to Williams' intimidation absent corrective action by the County?

Did the trial court err as a matter of law by not permitting Young to have a jury evaluate his claim for negligent infliction of emotional distress even if the conduct in his work environment was not itself a violation of the Washington Law Against Discrimination?

Issues Related to Assignment of Error No. 6

Under RCW 51.04 and precedent of appellate courts, was Young's cause of action for negligent infliction of emotional distress proximately caused by ongoing physical and intimidating behavior not arising from discipline preempted by Industrial Insurance Act when:

a. Young's only physical injury covered by the Act and covered by it
b. was the single traumatic injury on September 10, 2010; and Young's mental health conditions arose from a series of actions over an extended period of time and were not an occupational disease under interpretative regulations at WAC 296-14-300?

IV. STATEMENT OF FACTS[4]

A. YOUNG'S EMPLOYMENT HISTORY BEFORE SUPERVISION BY B. DOUGLAS WILLIAMS

Young has worked in the King County Real Estate Services section, (hereinafter RES") a work group of the Facilities Management Division ("FMD") since 2000. CP4. He is a Black male and has been classified as a Real Property Agent(hereinafter "RPA") III in that group's

Permitting Section (hereinafter "Permitting") for most of his career. *Id.* CP 729. During the period before Williams' hire, Permitting was supervised by Bernard Thompson, also a Black male, and primarily included Real Property Agents Dorothy Bolar, Young and Aaron Halley. CP 736. The work environment was harmonious and productive before Williams became supervisor. *Id.*

Young and his colleagues were responsible for processing a variety of permits for use of real property of King County for special events, as well as those involving construction, right of way, franchise and or wireless providers. CP 674; CP 133. Thompson was a working supervisor and performed permit duties in addition to his supervisory role. CP 736; CP 132.

Young was widely recognized by Williams and his peers as the most senior employee in that work group. CP 736. CP As such, he has been recognized as having subject matter expertise and extensive job knowledge in the permitting process and particularly special use and wireless carriers. CP 750; CP 131.

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[4] Facts are referenced to the Clerk's Papers as CP____

B. DOUGLAS WILLIAMS' HIRE, HIRING PRACTICES AND INITIAL TREATMENT OF YOUNG AND OTHER BLACK EMPLOYEES

In 2007, after the retirement of Bernard Thompson, Williams, a Black male employed in another work unit of King County, was appointed supervisor of Permitting. CP 677;CP 222-223. Unlike Thompson, Williams only monitored the progress of the Agents and did not have prior work experience in the permitting function. CP131-32. CP 736. In the observation of Young and coworker Aaron Halley (hereinafter "Halley"), another senior Black co worker, Williams' management style sharply contrasted with Thompson's. His lack of knowledge of standard operating procedures and practices was observed by both Halley and Young and he resisted input from them, causing tension that was not present before. CP 731.CP 132; CP 732, 737.

With new Caucasian employees, he was openly collaborative *Id.* He was more "top down" in his approach to Young and Halley. CP 132. Additionally, early in his tenure with Permitting, Young and Bolar were the subject of offensive, unsolicited, inappropriate ccomments from Williams questioning whether they were qualified for the job each had performed for years. CP737. CP463. Additionally, unlike Thompson who had supported Young for advancement and reclassification due to his body

of work and expertise, Williams did not support Young's desire to become a RPA IV. CP 677.

Under Williams' tenure, Permitting staff increased as others left; Williams also redistributed work responsibilities from Young and Bolar to Caucasian new hires or former employees. CP 736-737. Williams actively participated in the selection of Caucasian employees Matthew Burke and Alex Perlman as RPA IIs. CP 729. Although Williams questioned Young and Bolar's expertise, the Caucasian new hires had no work experience with the County's permit processing system. CP 882-884. Williams still assigned each new hire portions of Young's historical body of work and responsibilities. CP 729. Williams and other RES management created a temporary position for a retired Caucasian employee, Carol Thompson. CP 871-877. Young observed that she received franchise permit assignment historically assigned to Young and Bolar. CP 877. CP 445.

During this time, Williams assigned Young filing duties he viewed as "grunt work," CP 445. Halley also observed that the workload was not even evenly distributed between him and Young and that he was overloaded. CP 736. Halley also noted that without explanation that Williams did not assign training responsibilities for the new staff to Young despite his subject matter expertise. CP 734; CP 730. Similarly, Williams

did not explain why he continued to remove responsibilities from Young and give them to the new hires. CP 733.

C. WILLIAMS' SCRUTINY OF YOUNG'S WORK DURING THE PERIOD FROM 2007 TO SEPTEMBER 2010

In Permitting, Young historically worked with other County Departments including its Prosecuting Attorneys' Office and the public and businesses to address and resolve right of way issues. (ROW) He developed expertise with wireless telecommunications customers but like his peers had a case load of special use permits. (SUPs) CP 127-131. He processed volumes of applications for access to the County's real property before and after Williams' arrival. *Id.* As an exempt employee under the Fair Labor Standards Act (FLSA) Young and other RPAs had responsibilities out of the office and he maintained a flexible work schedules, including partial day absences. CP 235. Employees used email and a board for reporting their ins and outs during working hours when work and /or personal responsibilities took them out of the office. CP 235. CP 825.

Soon after his transfer to Permitting, Williams began to increasingly scrutinize Young's action during the work day and engaged repetitious email exchanges questioning Mr. Young's actions. These alleged concerns included use of time or receipt of personal phone calls

during his work day. See e.g. CP 231-232 and CP471-472. Young resented this focus on him and complained about it to Williams.

Early on and for years, Williams and other FMD management also received frequent emails describing Young's alleged workplace activities and use of time from Halley. Halley was not Young's lead or assigned to this task but he did so with knowledge of Williams and RES managers. [5] CP 133. Halley apparently did not so with other RPAs. This allegedly "uncondoned" conduct caused Young significant emotional distress that he reported to his mental health care provider. *See e.g.* CP951 CP1038.

During the period before 2010, Williams also frequently emailed Young with conflicting unrealistic expectations as to Young's workload. CP 445-480, CP 814-815. He permitted Halley to continually monitor Young's actions and kept his own records on Young. CP 225. Again, Young objected to Williams' actions and felt Williams was applying different expectations to his White peers and objected to that. CP 232.

Young acknowledged being outspoken in such feedback to Williams but viewed it as professional; he knew Williams had the

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[5] The full extent of this early documentation was not revealed to Young until discovery and dispositive motions in this case.CP17. See "slacker log" CP136-162. Young had received reports of this activity from peers as others knew he was monitoring Young's activities. CP 605 and reports to Williams and logging during the workday was also using County time for such purposes and his own. CP133-134, CP 136-161. At least one other employee has viewed him

authority to assign and direct Permitting employees. CP 131, CP 739. Bolar observed Young as professional and constructive. CP 764.

D. THE SEPTEMBER 10, 2010 INJURY

1. The Incident and Management's Response

On September 10, 2010, Young was engaged in a conversation with Matt Burke, about a work-related matter at a long public work counter that was several feet off the floor, CP448. At some point, Williams interjected himself into the conversation. Rather than permit him to interrupt, Young put his hand up as if to say "wait a minute" and instead of respecting that, Williams pulled his hand, arm and body down across the counter sufficiently harshly to cause serious pain and Young to feel like his shoulder or arm was being pulled out of its socket. *Id. See also* CP 739-740; CP 670. Young immediately reported this contact to Human Resources and characterized it as an assault, *Id.* An investigation ensued by HR. CP 109-11.[6] Several weeks later, Young received a reprimand for his alleged "disorderly conduct" and was required to acknowledge and review a list of workplace expectations that were only

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engaged in the same conduct he criticized in Young and questioned Halley's reports. CP 760-762.

[6] Young has consistently reported this interaction in contemporaneous reports to his management, in investigative interviews with HR, and to his managers as he did in CP670. It is undisputed that Williams reached over the

issued the day of the incident. CP112-113. Although these applied to all employees including managers, CP 113, Williams was not required to acknowledge and conform to the same expectations. CP105; CP 335.

2. The Injury and Young's Use of Time for Medical Appointments And Ensuing Discipline.

Following the incident on the 10th, Young experienced numbness, pain and discomfort in his arm and shoulder. That in turn limited his use of that arm including use of a key board. He continues to experience these symptoms. CP740. As discussed *infra* at section 3, Young's physician authorized time off and a course of physical therapy, diagnostic testing and other medical evaluation. *Id.* Various physicians reached different conclusions as the cause of his symptoms and injury, *Id.* but he was diagnosed with thoracic outlet syndrome[7] CP 1017, CP 102; CP 740.

For some time after the September 2010 incident, Young had follow up appointments with health care providers trying to diagnose and treat the injury. CP 740. As indicated, as an exempt employee , Young understood past practice permitted use of partial day sick leave for

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Counter to grab Young. Williams also received a written reprimand for his "grabbing of Young's arm" and disorderly conduct,

[7] Thoracic outlet syndrome is a group of disorders that occur when the blood vessels or nerves in the space between your collarbone and your first rib (thoracic outlet) become compressed. [It] can cause pain in [the] shoulders and neck and numbness in ....fingers..... Common causes... can include physical trauma.... Source:http://www.mayoclinic.org/diseases-conditions/thoracic-outlet-syndrome/basics/definition/con-20040509

medical appointments as long as he maintained progress on his duties. CP 74. CP 105 CP 768. Williams had approved such absences before the September 10 injury. CP 262. Following the incident, Williams began to increasingly monitor Young's use of time and report it to his management. See e .g. CP 243-245, While Williams scrutinized Young's use of taking partial day absence as an exempt employee, past practice in the unit had been more relaxed. CP 768. See also CP 677-678.

In February 2011, Young received a written reprimand by RES Manager Steve Salyer for his use of time CP 115.[8] He again was requested to reaffirm new workplace expectations put in place after his injury that were inconsistent the more flexible practice. CP 115. Attendance-related discipline was issued to ***other FMD*** employees, no exempt employees of RES manager Salyer were reprimanded for setting their own schedules. CP 399-411. Even with the expectations provided in 2010, CP 115, CP 432, in ***September 2013***, FMD Director Kathy Brown issue another notice to all FMD exempt employees because of a "perception that [exempt] employees did not consistently abide by regular schedules." CP435. Young believed again he was treated differently than coworkers and grieved this action to his union.

[8] Williams, while identified as a supervisor, had limited authority to issue disciplinary action and hire and fire without managerial approval.

3. Young's Worker's Compensation Claim

After the injury, Young's doctor initially approved time off until September 20, and recommended treatment and evaluation under that claim. CP 1105-1016; CP1014-1023. He was approved for time off until September 20, 2010. CP 1016. With his physician, Young filed a claim for benefits under the IIA through the County's self\-insurance on September 20 that was approved for coverage in November 2010. CP1015; CP 969. Young continued to use the Act's benefits even when there was conflicting views as to the etiology of his condition. CP 1020. Young never claimed benefits for emotional or mental health conditions he experienced as part of that claim. He did not make any claim that those conditions were caused by the physical injury and that was never adjudicated. CP975. The claim was closed in August 2011 with a finding that Young had not sustained a permanent partial disability as a result of the industrial injury on September 10, 2010. CP 972. On review, his diagnosis of thoracic outlet syndrome was not viewed as an occupational disease covered by the Act. [9]

[9]A hearing was scheduled for late December 2012 and ultimately dismissed because of conflicting medical evidence as to the cause of the thoracic outlet syndrome. CP975-979. That was the sole issue appealed.

E. WILLIAMS' CONTINUED SCRUTINY OF YOUNG'S WORK PERFORMANCE AND INITIATION OF OTHER INVESTIGATIONS DIRECTED AT YOUNG

After the September incident, Williams also used his authority to initiate investigations into Young's alleged performance deficiencies or alleged conduct in the workplaces. CP 741. *See also* CP 226-227. In addition to the issuance of a written reprimand for his absences identified above, in February 2011, Williams also requested that HR initiate an investigation into Young's conduct in processing and closing older inactive permits, a central responsibility of his position shared with others in his group. *Id.* Williams reported that Young was being dishonest in his reports to him as to closure of permits. CP226. Despite the severity of this allegation, no formal investigation ensued or disciplinary action taken and the allegation was not sustained. CP 227.

Similarly in the same year, while collection efforts for user fees from T-Mobile were under way in cooperating with the Prosecuting Attorneys' Office, Williams took issue with Young's interactions with representatives of T –Mobile, a customer that he historically assisted, when Williams was out of the office in March of 2011. See CP 127-131. Williams requested that HR investigate Young's contact with this customer, and accused him of violating a directive, CP127 Months later, in May of 2011, the HR investigation concluded that Young had not

"violated a lawful directive of a superior." *Id.* He also noted that Williams had acknowledge that Young had the most "historical knowledge of [wireless] permits" concluded that there was no basis for taking disciplinary action against Young for having contact with the T-Mobile representative. *Id.* A chart summarizing investigations, proposed or actual discipline initiated by Williams or investigations requested by Young in response to interactions with Williams is summarized at Appendix B to this Brief.

F. WILLIAMS' CONTINUED AGGRESSIVE CONDUCT TOWARDS YOUNG

1. The March 27 2012 incident and investigation

Williams' actions towards Young affected him at work before he sought mental health support, Young advised his managers and HR staff that he was experiencing claustrophobia in stressful interactions primarily with Williams CP303. Terri Hansen, HR Manager, had suggested and ground rules were set where he was permitted to ask for "a break" or time out when he felt the situation was escalating. CP316 and that was known to Williams before late March of 2012. CP 303. CP 753.

Nonetheless, on March 27, 2012 Young, Williams and a consultant were in Young's cubicle testing new software to be used in the Permitting office. CP 305-307. In the presence or earshot of coworkers and the

consultant Williams took with issue with Young and escalated the discussion. Young indicated he was claustrophic and needed to leave his cubicle. CP 311. When Young attempted to leave his cubicle, Williams physically blocked his exit. CP 303. Williams subsequently followed Young down the hall to the Human Resources yelling at him as Young attempted to report immediately after the incident. CP 743, CP 753. Young reported he was shaking and on the verge of a total panic attack." CP 753. Some coworkers though the interaction could lead to violence. Young later returned to his cubicle and Williams continued to engage him. One coworker described Williams standing over him "too close." CP 760.

Following this encounter, in April 2012, another investigation was initiated as a result of Young's report of the threatening conduct by Williams. CP 303-305. Conducted by Steve Salyer, the Real Estate Services Sction Manager and Williams' supervisor, that investigation verified that several coworkers that Young had disclosed to Williams that he was feeling claustrophobic before he left his cubicle. CP 311. Several also verified that Williams continued to argue with him after Young left the cubicle *Id.* Salyer's 4/16 and 4/17 2012 investigation concluded as follows;

> It appears that Doug Williams' physical positioning may have served as an impediment to Christopher's ability to exit the cubicle. ...***Doug was aware of previous situations when***

> ***Christopher's alleged claustrophobic like reaction under stress was a problem. In this regard, Doug appears to have used poor judgment as a Supervisor in handling the emotional confrontation***... [I]t appears that Doug used unnecessarily sarcastic language and tone in addressing Christopher when he returned to his cubicle. It appears that Doug's action most likely worsened the emotional level of this situation.

CP 303-305. Despite these findings, Salyer subsequently discouraged Young from seeking assistance from Human Resources when interactions such as these occurred and indicated that such action was "unacceptable." CP 179. Months after this fact gathering was complete, Young was recommended for a five day suspension arising from the interaction that day. CP 310. CP 307-312.[10] Even after this interaction, In October 2012, another incident occurred where Williams interrupted Young while he was at the printer and physically pushed him and grabbed work that Young was engaged in copying. CP 324; CP 743. CP 755. This was also reported to HR. *Id.*

G. REAL ESTATE SERVICE TREATMENT OF OTHER EMPLOYEES ACCUSED OF MISCONDUCT OR OTHER VIOLATIONS OF WORKPLACE EXPECTATIONS

Williams requested investigation on at least one occasion of alleged "misconduct" by Matthew Burke, one of Young's Caucasian coworkers. CP 681-682. The County had a formal process for initiating

[10] Williams was also recommended for the same discipline. Unlike Young, Salyer gave Williams an opportunity to take the rest of the day off after advising him of the possible discipline. CP 307 vs. CP308

such requests for investigation as Williams did with respect to Young's alleged misconduct on several occasions. See CP 105-106, CP 124-125. [11] No evidence was introduced that Williams used that process with respect to any concerns about Burke's conduct or other employees. The Union representing RES was well aware of other conflict in RES that apparently did not escalate to formal discipline. CP767.

Similarly, the record discloses no reprimands or scrutiny of other employees of RES related to attendance concerns consistent with the past practice of flexible schedules. .

H. YOUNG'S REPORTS TO MANAGEMENT AND HR WITHIN HIS DIVISON REGARDING WILLIAMS' TREATMENT

1. Reports to Real Estate Services and Facilities Management Division Managers

Throughout his experience under Williams' supervision, and threatened or actual discipline increased, and the physically aggressive behavior conduct Young made frequent appointments with managers of Williams. Although he did not identify the behavior as racially motivated, Young gave notice of the pattern that he observed and that Williams was "setting a different standard" with him. CP 742. He used the phrase

[11] The record produced below does not contain any testimony documentation of investigations into the conduct of any other employees of Real Estate Services or

"harassed "and "hostile work environment" to describe the behavior he experienced. He frequently used analogies to explain how Williams discredited him in comparison with his Caucasian coworkers. CP742

He reported conduct on more than one occasion to Steve Salyer, Manager of Real Estate Services and Williams' immediate supervisor CP 742. Salyer actively discouraged Young from contacting the Division's HR staff to address his concerns about Williams' and confine himself to the Division's chain of command. CP174. Young also met with Ameer Faquir, Deputy Division Director and Kathy Brown, Division Director, about what he observed as an increasingly hostile work environment as well as discreet actions such as performance appraisals. CP 610.

2. Young's Initial Reports to Division HR Staff

Despite Salyer's admonition about contact with HR, Young contacted FMD HR staff such as Janice Evans and Bob Doyle to raise concerns and later met with new HR Manager Alan Momohora. Some interactions were investigative interviews related to proposed discipline but Young used HR staff to report his own concerns about Williams' ongoing conduct. CP 174. Young initiated the complaint arising from Williams's aggressive contact with him in September 2010. CP104-105. He again did so in response to Williams' aggressive conduct on March 27,

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Permitting but only of other employees in The Facilities Management Davison under

2012. CP 753. Additionally, RES Section Manger Salyer discouraged Young from taking his complaints to HR. See CP 177 (continuing to seek assistance from HR regarding problems ...with Doug or others concerning work-related matters is...unacceptable.") *Id.* This occurred after Salyer's investigation concluded that Williams' action on March 27 2012 was inappropriate.

As a result of the proposed five day suspension for Young's alleged conduct during the March 27 2012 interaction with Williams, Young met with Division Director Kathy Brown, RES Manager, Steve Salyer, Alan Momohara, HR Manager, at his Union representative Matthew House on June 13 2012 for a "Loudermill hearing" to provide his response CP315, CP 2295. At that time, House raised the possibility of race discrimination and/or retaliation motivating Williams' behavior. He also raised concerns as to the County's response and Young affirmed that.

Specifically, Momohara reports that House stated:

> Christopher if [sic] often subjected to a meeting with Doug and it turns into discrimination... Christopher was concerned about making a statement because in the past, it had backfired and management and Doug retaliated against him. ....

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different line supervisors and managers. See CP 329-324.

CP 313. Young acknowledge this statement as true. *Id.* He referred to Williams' conduct as a "witch hunt... and [that] he was being investigated for something every two months." *Id.*

After consulting with FMD Management, Momohara initiated contact with both Young and his union representative to discuss these allegations of race discrimination and retaliation. CP 319. Due to Momahara's unavailability, Teri Hanson conducted the meeting on July 31, 2012. CP 221. In addition to Hansen and Young, Matthew House, Young's Union representative appeared as did Brian Dolman, a private lawyer Young had consulted earlier that spring. See section I. *infra*. *See also* CP 321-322.

Prior to the meeting, Young expressed concern about combining the issue of discrimination while his proposed discipline was still pending. CP 778. However, Young again stressed that his concerns about disparate treatment primarily were those of retaliatory treatment through the multiple investigations initiated by Williams against him and that he was "creating a hostile work environment. CP322. House emphasized that the proposed discipline for the March 27 2012 incident had not been decided and Dolman delivered a letter explicitly providing notice of the need to address Young's anxiety and other mental health conditions through changes in the way Williams' interactions with him . CP937-938.; CP

321-322. The County never implemented the proposed suspension or implemented Dolman's proposals CP 778

Six months later, after Williams had left the unit, and after Halley (and possibly others) also raised concerns about racial bias by Williams while he supervised Permitting, Division Director Kathy Brown initiated a formal investigation in May of 2013. CP781-786. Mr. Young met with the investigator Prosecutor Stephen Teply in the presence of his new lawyer Susan Mindenbergs and not his union representative. CP 860-870. CP 799-801. Prior to and at the meeting (with counsel), both Young and Halley expressed concern as to why such an investigation was being initiated so late and after Williams no longer supervised the unit. CP870. Young raised concerns about the September 2010 "assault." CP 800. Both felt it was too late to address the past behavior. No further investigation occurred thereafter and Young subsequently filed a tort claim prepared by Mindenbergs. *Id.*

I. YOUNG'S USE OF OTHER RESOURCES TO ADDRESS WILLIAMS' TREATMENT OF HIM AND THE IMPACT ON HIM

1. Young's Use of Mental Health Counseling And Private Counsel to Address His Ongoing Concerns

Young had previously reported symptoms of anxiety and depression to his primary physician arising from his work environment

and was prescribed anti-anxiety medication and then anti-depressant medication in September 2011 but was reluctant to initiate counseling. CP 1020-21. Following the March 27 2012 interaction with Williams where Young experienced severe claustrophobia, anxiety and panic as Williams raised his voice, he referred himself to a mental health provider for evaluation and a referral for counseling that evaluation was conducted by Cherryl Jackson-Williams in April 2012. She administered testing and also relied on Young's self-reports. CP 940-964. He reported to her that he was in a hostile work environment "that included workplace violence" *and* his coworker and supervisor's continued scrutiny of his conduct. CP1038.[12] CP961. He also indicated that "he felt victimized" by the response of his employer to the actions of Williams. CP 961. She diagnosed him with anxiety, PTSD and Panic Disorder. CP940 and CP 963. CP 1038, He reported physical symptoms consistent with these diagnoses on a consistent basis. CP 950, CP 1030. CP 1038.

As indicated *supra,* Young also engaged a private lawyer, Brian Dolman, to advocate for him regarding the work environment not disciplinary issues. CP 937-938. Both House and Dolman attended the June 13 2012 meeting with Terri Hansen regarding follow up on Young's

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[12] Ms. Jackson Williams' testimony and exhibits are referenced beginning at CP 1036. See Supplemental Index to Clerk's Papers.

report of potential race discrimination and retaliation. *Id.* As indicated above, Dolman emphasized the County's failure to provide a safe work environment for Young and later followed up on those concerns after the September 2012 aggression by Williams cited in section F *supra.* CP 324-325. Dolman subsequently ceased his role and as indicated above, Young subsequently retained attorney Susan Mindenbergs in 2013.CP 799-80. FMD Division Director Kathy Brown initiated then an investigation into past "**and recent**" discrimination by Williams. CP 770, CP 785-786.

J. PROCEDURAL HISTORY OF LITIGATION

After that meeting, in July 2013, with his then lawyer, Young filed a tort claim outlining his claims. CP441-445. He ultimately initiated the current litigation *pro se.* CP1-8. After producing preliminary discovery and identifying of potential witnesses, he retained his current counsel to defend a scheduled deposition on July 18, 2014 who ultimately made a general appearance on his behalf. CP 17.

Young was scheduled for a second deposition on October 30, 2014. At that deposition, the County's counsel acknowledged that Young was asserting an unlawful hostile work environment. Young's counsel indicated a proposed amendment would be provided and that there would be no objection to further discovery of Plaintiff if needed. CP 22-27. Counsel drafted a proposed complaint which amplified his prior pleading,

stated facts in support of them, and also raised the issue of retaliation or the County's additional scrutiny of his work raised in discovery and counsels' inquiries during deposition. CP The County's counsel was tendered the proposed complaint but counsel ultimately refused to stipulate to the prosed amendments. CP 19 – 21.

Young moved to amend the complaint on December 22, 2014 addressing both new allegations and reframing his hostile work environment claims from the pro se complaint. CP 19-97 After response and reply, and without oral argument, the Court refused to grant the Motion to Amend on January 15, 2015. CP 1032-1033. This decision occurred following the County's filing of a motion for summary judgment on December 26, 2014, CP 78-103, with Young's response due on January 13, 2015. The County moved to strike Young's response before he had notice of the Court's action on his motion to amend. CP 895-901.

In the dispositive motion, the County included an argument regarding hostile work environment but also supported its motion for summary judgment with evidence of its further investigations into conduct by Young from 2013 to May 2014, the very issues alleged in his Motion to Amend including review of desktop computer and key card well beyond the period covered by the original complaint. CP 349-3497. The evidence verified Young's proposed amendment that the recent invasive

investigations were initiated in response to requests from the Prosecuting Attorney as part of its defense of the litigation and was could be alleged as an act of additional retaliation. CP180-219.

The trial court took oral argument on the County's motions on January 23, 2015. At the hearing, after counsel sought clarification of the January 15, 2015 ruling on her Motion to Amend, the Court did permit some argument on Young's theory of hostile work environment and retaliation without permitting the record to be amplified and without clarifying which cause of action she wished to hear argument on. RP5-7. The court took the motion under advisement and sought supplemental authority on the common law claim for negligent infliction of emotional distress (hereinafter "NIED") RP50, 54. Without any specific details of her rationale, on February granted the County's Motion for dismissal of the RCW 49.60 claims, but denied such relief on his NIED claim. CP 1030-1031.

Months later, as trial approached, the Court authorized a second dispositive motion. Although framed as an argument as Motion to Dismiss for Lack of Jurisdiction, the County's assertion primarily was that the NIED cause of action was preempted by Young's prior use of the Industrial Insurance Act to address the physical injury that occurred in September 2010. CP 904-915. After response and reply briefing and oral

argument on April 30 2015, CP RP 63-94, the trial court granted that motion on May 15, 2015. CP 1024-1035. Young filed a Notice of Appeal on June 15, 2015. CP 1029-1028.

V. ARGUMENT AND AUTHORITY

A. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING YOUNG'S MOTION TO AMEND HIS COMPLAINT

1. The Legal Standards for Granting A Motion To Amend

Civil Rule 15(a) generally provides that leave to amend a pleading "shall be freely given when justice so requires." *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wash.App. 192, 199, 49 P.3d 912 (2002). Appellate courts will review trial court decision to deny amendment under an abuse of discretion standard to ensure that the record contains sufficient evidence of undue prejudice to the nonmoving party. The rule is designed serve to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them but not to erect formal and burdensome impediments to the litigation process. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). In determining whether prejudice would result, the trial court should consider factors of *undue* delay, unfair surprise, or the introduction of remote issues. *Kirkham v. Smith*, 106 Wash.App. 177, 181, 23 P.3d 10 (2001). *Herron*, 108 Wash.2d at 165-66,

736 P.2d 249; *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983). Our Supreme Court has recognized that the "timing of a motion to amend pleadings — in terms of the progress of the litigation ....is not dispositive" of the question of prejudice. *Herron* supra, citing. *Caruso,* at 349-50. In the case at bar, the trial court's January 15, 2015 order did not state a basis for its action. As this Court has stated:

> A trial court's failure to explain its reason for denying leave to amend may amount to an abuse of discretion unless the reasons for denying the motion are apparent in light of circumstances shown in the record.

Rodriguez v. Loudeye Corporation, 144 Wn. App.709, 189 P3d 168, 729-30 (2008) citing *Tagliani v. Colwell*, 10 Wash.App. 227, 233, 517 P.2d 207 (1973).*See also Donald B. Murphy Contractors, Inc. v. King County,* 112 Wn. App.at, 199. Even in her decision to take additional argument at the summary judgment hearing and in a phone conference, the Court did not truly clarify her ruling. RP4-9 (1/23/2015); RP 56-63 (2/20 call).

2. Young Proposed Amendment to Expressly State A Claim of Hostile Work Environment Based on the Events Occurring Between September 2010 and September 2013 Was Not Unduly Prejudicial and Was Litigated With the Express Consent of the County

In *Herron,* the Court noted as follows:

> Although amendments pertaining to new transactions are permitted, those which pertain to the original claims
> Are more likely to be granted. Appellate decisions permitting amendments have emphasized that the moving parties in those

> cases were merely seeking to assert a new legal theory based upon the same circumstances set forth in the original pleading.

Herron, supra, 108 Wn.2d at 167, other citations omitted.

In *Caruso,* the Court upheld an amendment to state an additional cause of action more than five years after the original complaint was filed. Id. The Court held that the defendant "had notice of a possible issue of def*amation" from the framing of the original complaint.* Id. Through his initial tort claim before the law suit was filed, Young alleged a "hostile work environment through unfounded investigations about him." CP 442. Additionally, opposing counsel herself in October of 2014 said that she believed Young "had expanded" his claims to include a hostile work environment. CP 58. This cause of action was also addressed in the County's summary judgment pleadings. CP 95-99. A significant part of the proposed amendment amplified the actions Young contended were adverse; those were relevant to both the existing disparate treatment, race discrimination claim and the cause of action for hostile work environment based on the same events occurring between September 2010 and his original *pro se* complaint . CP 32-35. At a minimum, the trial court should have permitted the substitution of the proposed amended complaint addressing those claims at paragraphs 1.1 to 6 .5. CP65-71.

3. Young's Proposed Amendments Related to New Factual Allegations Disclosed by the County in Discovery and Were Litigated With Their Implied Consent

In addition, under CR 15(b), the trial court erred by refusing the amended complaint where, as here, the additional issues have been litigated with the express or implied consent of the other party and where necessary to conform to evidence developed through discovery. CR 15(b). *See e.g. Longenecker v. Brommer,* 92 Wn.2d 552, 368 P.2d 900 (1962). Additionally, CR 15(c) expressly contemplates service of an amended complaint sating "supplemental events that have happened since the date of [the original pleading]." Such action is necessary to encourage judicial economy and conserve litigants' resources. *See e.g. Harding v. Will*, 81 Wn.2d 130, 500 P.2d 91 (1972). Amendments have been permitted alleging event that had not occurred at the time the law suit began including actions occurring just before trial. *See e.g. Honan v. Ristorante Italia,* 66 Wn. App. 262, 832 P2d 8 (1992) [[permitting new cause of action for fraud and misrepresentation discovered on the day of trial].

The new factual contentions alleged included Aaron Halley's continued monitoring of his work at paragraph 4.17. The extent of that conduct was not known to Young until deposition was used in deposition. CP and regarding the ongoing monitoring and scrutiny of Young through

additional investigation for "alleged misuse of County resources" that *began in May 2014.* CP64. Young was formally notified by his management of this investigation only in January 2015 after the motion to amend was filed. CP 771-772. Only weeks before, the declaration of IT staffer Elise McConnell verified that investigation of his entire computer, email and internet usage was initiated by the County's legal counsel. CP 180-221. Permitting the County to expand the scope of their defense to include new events but not permitting Young's proposed amendment to address the same events as a form of litigation retaliation is an abuse of discretion by the trial court.

4. Young's Proposed Amendments Fulfill the Purpose of the 2009 Amendments to RCW 4.96.020 and Do Not Require An Additional Tort Claim or Adherence to the 60 Day Waiting Period.

Young acknowledges that before filing the motion to amend his complaint, he did not file a new or amended tort claim under the provisions of RCW 4.96.020. In 2009 the legislature enacted a new subsection to RCW 4.96.020, which. States:

With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory...

RCW 4.96.020(5) cited in *Lee v Tacoma Metro Parks*, 335 P.3d 1014 (2014). Substantial compliance of a statutory requirement means that the

"statute has been followed sufficiently for which the statute was adopted." *Banner Realty,* Inc. v. Dep't of Revenue, 48 Wash.App. 274, 278, 738 P.2d 279 (1987) (quoting I*n re Habeas Corpus of Santor*e, 28 Wash.App. 319, 327, 623 P.2d 702 (1981)).

Here, the purpose of providing the County an opportunity to evaluate the race discrimination and retaliation allegations had been satisfied in the earlier tort claim.

B. The Court Erred in Dismissing Young's Claim for Disparate Treatment in His Employment And Hostile Work Environment Due to Race

1. Standards of Review of Summary Judgment

The trial court's order on summary judgment is reviewed *de novo. Camicia v. Howard S. Wright Constr. Co.*, 179 Wash.2d 684, 693, 317 P.3d 987 (2014), This Court should consider all evidence brought to the "attention of the trial court". RAP 9.12, *Mithoug v. Apollo Radio of Spokane,* 128 Wn.2d 46,909 P.2d 291 (1995) Summary dismissal is only appropriate if there is no genuine dispute as to material facts. A material fact is one upon which the outcome of the litigation depends in whole or in part. *Morris v. McNichol,* 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Like the trial court, this Court must consider all facts and make all reasonable inferences from those facts in the light most favorable to Young as the

nonmoving party and may grant summary judgment only if reasonable people could reach but one conclusion as to the evidence. *Ellis v. City of Seattle*, 142 Wash.2d 450, 458, 13 P.3d 1065 (2000) [reversing summary judgment in common law retaliatory discharge case]. Neither this Court nor particularly the trial court is tasked with evaluating the weight or truth of competing factual assertions. As this Court has stated:

> [T]here is a difference between weighing evidence and credibility—which are functions for a trier of fact and not for the trial or appellate court on summary judgment.

Snohomish County v. Rugg, 115 Wn. App. 218, 61 P. 3d 1184, (2002),

2. Washington's Long History of Disfavoring Summary Dismissal of Claims Under Our Law Against Discrimination

In clarifying and articulating the burdens of employees opposing summary judgment in cases brought under RCW 49.60, Washington's Law Against Discrimination (hereinafter "WLAD") our Supreme Court has recently stated :

> Summary judgment to an employer is seldom appropriate in WLAD cases because of the difficulty of proving a discriminatory motivation. *See Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 144, 94 P.3d 930 (2004); *Sangster v. Albertson's,* Inc., 99 Wash.App. 156, 160, 991 P.2d 674 (2000) ("Summary judgment should rarely be granted in employment discrimination cases."); *see also Rice v. Offshore Sys., Inc.*, 167 Wash.App. 77, 90, 272 P.3d 865 (2012) (When the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation.). To overcome summary judgment, a plaintiff only needs to show that a reasonable jury could find that

> the plaintiff's protected trait was a substantial factor motivating the employer's adverse actions. *Riehl,* 152 Wash.2d at 149, 94 P.3d 930. "This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence." *Id.*

Scrivener v. Clark College, 181 Wash. 2d 439, 334 P. 3d 541, (2014).In doing so, the Court reaffirmed that "employees may satisfy the pretext prong of the McDonnell Douglas framework[13] by offering sufficient evidence to create a genuine issue of material fact *either* (1) that the employer's articulated reason for its action is pretextual *or* (2) that, although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." *Id.* Emphasis added. "An employer m*ay be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions a*nd still be liable under the WLAD." *Id.*

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[13] Washington's appellate courts have traditionally drawn its analysis of the relative burdens of employee and employer in WLAD cases from the US Supreme Court's analysis in M*cDonnell Douglas Corp. v. Green*, 411 U*S 792, 93 S.Ct. 1817, 36L.Ed.2d 668 (1973)* cited in *Hill v. BCTI Income Fund-I,* 144 Wash.2d 172, 186, 188-89, 23 P.3d 440 (2001)3d 440 ( ). Our courts have noted "The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the "plaintiff [has] his [or her] day in court despite the unavailability of direct evidence." *Sellsted v. Washington Mutual,* 69 Wn. App. 852, 864, 851 P.2d 716 (1993). As a result, Washington courts often look to federal decisional law when it further the liberal construction of our own anti-discrimination mandates. *Allison v. Housing Authorit*y, 118 Wn 2d. 79, 821 P.2d 34(1991)

3. Young Has Introduced Evidence On Each Element of His Prima Facie Case and Evidence Exists From Which A Jury Can Infer That Young's Race Was A Substantial Factor In Williams' Adverse Treatment of Him

Thus, there is no single inflexible method for Young establish his prima facie case nor is an onerous burden. *Johnson v. DSHS.* 80 Wn. App. 212, 907 P.2d 1223. (1996) [reversing SJ in race discrimination case involving disparate discipline of public employee]. Young can make the formulation as follows:

> (1) He belongs to a protected class, (he is a Black male)
> (2) He was treated less favorably in the terms or conditions of her employment than similarly situated, Caucasian employees,
> (a) He experienced adverse actions through threatened and implemented discipline and excessive scrutiny of his work
> (b) Caucasian employee of RES engaging in acts of comparable seriousness were not disciplined or scrutinized.

See e.g. W*ashington v. Boeing Co.,* 105 Wn. App. 1, 13, 19 P.3d 1041 (2000); *Johnson,* supra at 1232. As the *Johnson* court stated:

> Johnson need not produce evidence that "he was *intentionally* treated differently, due to his race, from a similarly situated non-black employee whose conduct was of comparable seriousness" The purpose of showing disparate treatment is to create an inference of discriminatory animus because direct evidence of discrimination is rarely available.

Johnson, supra at fn 20 citing *Carle v. McChord Credit Unio*n, 65 Wash.App. 93, 827 P.2d 1070 (1992).

Courts have found evidence of pretext in the following way:

1. Treating comparators better, *Johnson, supra*
2. The stated reasons are false or unworthy of credence; Id.
3. Employer failed to follow its own policies; *Porter v. Cal. Department of Corrections,* 4919 F3d 885,896 (9th Cir. 2005);
4. Or otherwise acting contrary to past practice. *Hysten v. Burlington Northern*, 372 F. Supp. 2d 1246, 1255-1556 (D. Kansas 2005)

Young and the County have both produced evidence that he was treated less favorably than Caucasian employees in Real Estate Services and in particularly in Williams' Permitting unit. Actions short of discharge including discipline and investigation of protected class members is sufficient The *Johnson case* involved demotion of a career Black state employee following investigation of sexual harassment claim vs. ninety day reduction in pay against Caucasian employee accused of sexual harassment *Id. at* 1232-1234. *See also Boyd v. State.,* 187 Wash. App. 1, 349 P3d. 864 (2015) [retaliation claim based on disparate discipline and investigations] As in those two public sector cases, Young raises similar claims that he was targeted for disciplinary interviews, investigations, and reprimands for his conduct. A jury could find that even if Williams and RES management articulated legitimate business reasons for its actions towards Young, those reasons were not their true motivation. For example:

> a. Williams acknowledges that he had concerns regarding alleged "misconduct" by one of his Caucasian subordinates but no evidence of a formal referral for investigation as he has done on multiple occasions for Young. RES employees often use County equipment or phones for personal reasons. Yet,

> Young is the only employee of that group targeted for investigation of such conduct. CP 760.
> b. There was a past practice in RES permitting exempt employees to set their own schedules. Only Young was reprimanded for failure to meet Division wide expectations that were not still not followed as of September 2013.[14]

Many of the allegations Williams made about Young, e.g. his failure to follow directives in contact with T-Mobile or lack of honesty in SUP were not substantiated.

In a recent WLAD race discrimination case, it was noted:

> Mr. Davis claims he was held to a higher standard than other employees; he was disciplined more harshly for missing work and being late than were his co-workers. West One disputes this claim. There is conflicting evidence as to the tardiness and truancy of Mr. Davis and other employees, and as to West One's tolerance, or not, of this behavior. On this record summary judgment was not appropriate.

Davis v. West One Group, 140 Wash. App. 449. 66 P. 3d 807 (2007)

C. The Court Erred in Dismissing Young's Claim for Disparate Treatment in His Employment Due to His Opposition to Williams Treatment of Him

1. Young Has Established A Prima Facie Case of Retaliation Under Washington's Law Against Discrimination

This Court has also recently noted:

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[14] The County's production of evidence of discipline taken against other Facilities Management Division employees does not establish whether those employees were

> Because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose.'" [Citations omitted]... [I]f an employee establishes that he or she participated in statutorily protected opposition activity, the employer knew about the opposition activity, and the employee was then [subjected to an adverse action]a rebuttable presumption of retaliation arises that precludes summary dismissal of the case.

Currier v. Northland Services, 182 Wn. App. 733, 332 P.3d 1006 (2014)

Thus to state his prima facie claim for unlawful retaliation, Young must show that

a. he engaged in a statutorily protected activity;
b. adverse employment action were taken;
c. There was a causal link between the employee's activity and the employer's adverse action(s).

Hollenback v. Shriners Hosps. For Children, 149 Wn. App. 810, 821, 206 P.3d 337 (2009) As in Young's claim of race discrimination, at the summary judgment stage, if both the employee and the employer present admissible evidence competing inferences of both retaliation and nonretaliation, then it is the trier of fact's task to choose between such

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exempt employees or otherwise similarly situated to Young nor their non-protected class status. See CP399 to 410.

inferences. See e.g. *Estevez v. Faculty Club of Univ. of Wa*sh., 129 Wn. App. 774, 798, 120 P.3d 579 (2005).

2. Young's Internal Complaints Are Protected Conduct

Here, relevant federal law holds that an employee need not speak "magic words" to give notice of discrimination[15]. Under RCW 49.60 .210, it is not necessary that the conduct complained of actually be unlawful—it is sufficient if the employee reasonably believes that the employer's conduct was discriminatory. *Renz v. Spokane Eye Clinic,* PS, 114 Wn. App. 611, 619, 60 P.3d 106 (2002).

Young complained to RES and FMD managers and the HR professionals as to Williams' disparate treatment for an extended period of time. Internal complaints are protected activity. *Passantino v. Johnson & Johnson Consumer Products,* 212 F. 3d 493, 500, (9th Cir. 2000) [under Title VII and WLAD) the Court noted that even initial informal reports were protected activity.

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[15] As noted in *Okomi,* infra, "several [federal] circuits have noted that sexual harassment complaints need not include "magic words" such as "sex" or "sexual" to be effective. *See, e.g., Broderick v. Donaldson,* 437 F.3d 1226, 1232 (D.C.Cir.2006) ("While no 'magic words' are required, the complaint must in some way allege unlawful discrimination, not just frustrated ambition."); other citation omitted. ("There is no magic word requirement.".)

> Initially, we note that Passantino's informal complaints to Williams in 1993 constitute a protected activity, such that actions taken against her after these initial complaints are appropriately the subject of her retaliation claim. See, e.g., *Moyo v. Gomez*, 40 F.3d 982 (9th Cir.1994) (allowing retaliation claim based on *informal protest* of allegedly discriminatory policy)

Id. at 506.

Similarly a federal appellate stated in the context of sexual harassment:

> The parties disagree centrally about whether Oculi's April 1 letter to the Mayor constituted protected activity because it did not explicitly mention sexual harassment... Here, it was enough for Okoli to twice complain of "harassment," even if it might have been more ideal for her to detail the sexual incidents she later relayed.... [She] referenced only a "complaint," her March 23 email was entitled "Harassment Complaint." She complained "unethical and unprofessional business characteristics, e.g., harassment, degrading and dehumanizing yelling and demanding conduct, disrespect ...The *City surely should have known that Okoli's complaints of "harassment" likely encompassed sexual harassment.*

Okoli v. City of Baltimore, 648 F.3d 216,224 (4th Cir. 201). Young communications used similar terms. *See e.g.* CP174.

3 It is for the Jury to Determine the Extent to Which the Actions Complained of Were Adverse Actions

In *Boyd* the employer argued that the actions taken against "were not adverse employment actions; rather, they were "legitimate business decisions" that, were disciplinary or investigatory in nature" .... Here, as

in *Boyd*, Young produced evidence of a combination of reprimands, investigations and physical and non-physical conduct by Williams.

> *[W]hether a particular action would be viewed as adverse by a reasonable employee is a question of fact appropriate for a jury.* ("Whether a reasonable employee would view the challenged action as materially adverse involves questions of fact generally left for a jury to decide.").
>
> *Boyd, supra,* other citations omitted.

As these cases demonstrates where there is competing evidence of competing reasons or inferences from undisputed evidence as to adverse action following complaints, the Court should defer the factual determination to the jury. In a case not unlike this, "[s]ome courts have found that a "pattern of antagonism" following an employee's protected activity can provide an inference of retaliation. *Kachmar v. SunGard Data Sys., Inc.,* 109 F.3d 173, 177 (3rd Cir.1997) (citation omitted)

In this case, there is no dispute that there was a pattern of hostility by Williams towards Young, particularly as he escalated his complaints about him. He was increasingly reviewed a "disruptive" by other managers when he attempted to hold Williams responsible for his own conduct. RES Section Manger Salyer discouraged Young from taking his complaints to HR. See CP 177 ["*continuing to seek assistance from HR regarding problems ...with Doug or others concerning work-related matters is...unacceptable.*" *Id.* This occurred even after Salyer's

"independent" investigation concluded that Williams' actions on March 27 2012 were inappropriate after Young initiated the complaint against Williams. From these facts, a jury could conclude that it was not Young's conduct that substantially motivated discipline and scrutiny but increasing frustration with his ongoing complaints.

D. The Court Below Also Erred In Dismissing The Hostile Work Environment Based on Race and/or Complaints of WLAD Violations

1. The Record Contains Admissible Evidence of Each Element of A Hostile Work Environment Due to His Race And Protected Conduct

Washington's courts have recognized that a hostile work environment claim based on unwelcome racially motivated behavior. As the Court stated in *Davis*:

> Mr. Davis alleges that West One created a hostile work environment affecting the terms and conditions of his employment. To establish a prima facie case he must show that he suffered harassment that was (1) unwelcome, (2) because he was a member of a protected class, (3) affected the terms and conditions of his employment, and (4) imputable to the employer. Conduct is unwelcome if the plaintiff did not solicit or incite it

Davis, supra, at 811 citations omitted. Young is unaware of any state appellate decision explicitly finding a cause of action for hostile work environment due to retaliation. Federal appellate courts including the

Ninth Circuit have recognized that such a claim is actionable. In *Ray v. Henderson*, the Court stated;

> We now examine whether Ray's allegation that he was subjected to a hostile work environment is cognizable under the anti-retaliation provisions of Title VII. We have not previously decided whether a hostile work environment may be the basis for a retaliation claim under Title VI..... However, the Second, Seventh and Tenth Circuits have held that an employer may be liable for a retaliation-based hostile work environment. [citations omitted]. We agree with our sister circuits Harassment is obviously actionable when based on race and gender. Harassment as retaliation for engaging in protected activity should be no different—

Ray v. Henderson, 217 F.3d 1234, (9th Cir. 2000). Formal recognition of such a cause of action clearly furthers Washington's strong public policy of protecting individuals who oppose practices that they reasonably believe are discriminatory or who participate in internal and/or external complaint proceedings. *See Allison, supra*. Here such a cause of action can be made by proof of the following elements;

d. Young engaged in protected activity or conduct;
e. That active was known to his employer;
f. He was subjected to unwelcome conduct following such activity;
g. the pattern of conduct was sufficiently abusive or pervasive to affect the terms and conditions of his employment; and
h. FMD management failed to take adequate corrective action to deter such conduct.

See e.g. *Glasgow v. Georgia Pacific,* 103 Wn.2d 401, 693 P.2d 708 (1985) (sexual harassment and applied to race and disability harassment

cases in *Fisher v. Tacoma School District,* 53 Wn. App. 591, 769 P.2d 318 (1989); *Robel v. Roundup Corp.*, 148 Wash.2d 35, 59 P.3d 611 (2002).

> The Court typically looks to the totality of the circumstances, analyzing `the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating . . .; and whether it unreasonably interfered with an employee's work performance' in order to determine whether a hostile work environment claim exists. Courts determine whether "an environment is sufficiently hostile or abusive by looking at all the circumstance, including 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.

See e.g. Glasgow, supra.

Young produced evidence through union representatives, himself, and private counsel, he provided notice of physically intimidating and threatening conduct and that Young did not incite or welcome, it. And that the alleged corrective actions taken by his managers did not deter the conduct.

E. THE TRIAL COURT ERRED IN DISMISSING YOUNG'S REMAINING CLAIM OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS FOR LACK JURISDICTION OR PREEMPTED BY WORKERS' COMPENSATION LAWS

1. The Trial Court Has Jurisdiction Over Civil Claims Of Negligent Infliction of Emotional Distress Arising in the Workplace

Significantly, the County's summary judgment motion sought dismissal of all of Young's claims including his cause of action for

negligent infliction of emotional distress (hereinafter "NIED"). In its order granting the motion for dismissal of the WLAD claims, the trial court explicitly denied the motion for dismissal of the NIED claim. The County did not seek reconsideration of that ruling. As indicated supra, the County brought a late motion to dismiss the NIED cause of action for lack of jurisdiction. [16] RCW 2.08.010 provides that "[s]uperior courts of this state have general jurisdiction to decide any justiciable controversy so long as jurisdiction is not vested in another court." Washington appellate courts have found that common law claims of NIED, while rare, are not foreclosed as a matter of law simply because they arise in a workplace setting. *See Kumar v. Gate Gourmet, Inc*. 325 P.3d 193 180 Wn.2d 481, 325 P.3d 193 (2014). *Goodman v. Boeing Co,* 127 Wn.2d 401, 889 P2d 1265 (1995); *Chea v. Men's Warehouse, 8*5 Wn. App. 405, 932 P.2d 1261 (1997), *Bishop v. State*, 77 Wash.App. 228, 233, 889 P.2d 959 (1995), *Strong v. Terrell,* 147 Wash. App. 376, 95 P. 3d 977(2008); *Wheeler v. Catholic Archdiocese*, 65 Wn. App. 552, 829 P.2d 196, 988 P.2d 1023 (1999) *Snyder v .MSC*, 98 Wn. App. 315, 988 P.2d 1023 (1999) result affirmed at *Snyder v. Med. Serv. Corp. of E. Wash.,* 145 Wash.2d 233,

[16] Because challenges to subject matter jurisdiction can be raised at any time, the County essentially circumvented the deadline for dispositive motions. In fact, their argument was really one of preemption as opposed to whether a court has subject matter jurisdiction. Subject matter jurisdiction refers to the authority of a court to adjudicate a

243-45, 35 P.3d 1158 (2001). The Superior Court clearly had subject matter jurisdiction over this dispute as does this Court.

2. The Elements of NIED

A plaintiff may recover for negligent infliction of emotional distress if she proves duty, breach, proximate cause, damage, and "objective symptomatology." *Strong, supra,* 147 App. at 387, other citations omitted. *Issues of negligence and proximate cause are generally not susceptible to summary judgment. Ruff v. County of King,* 125 Wn.2d 697, 703, 887 P.2d 886 (1995), emphasis added. Only when reasonable minds can reach but one conclusion may questions of fact be determined as a matter of law. *Id. at* 703-04.

3. Young's Cause of Action for Negligent Infliction Of Emotional Distress Is Not Preempted by the Industrial Insurance Act

Similarly, the mere fact that an employee is seeking a remedy for emotional distress caused by employer or co-worker conduct in the workplace is also not inherently preempted by the Industrial Insurance Act (hereinafter ("IIA") Each of these cases dealt with abusive, harassing conduct and in *Chea* physically aggressive conduct not unlike the conduct here. Both *Goodman* and *Chea* upheld jury verdicts for the plaintiff on employment discrimination *and negligent infliction of emotional distress,*

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particular type of controversy, not a particular case... *State v. Franks*, 105 Wn.App. 950,

Goodman, supra, 104 Wn. 2d at 407; *Chea,* supra, 93 P.2d at 1265. The *Goodman* Court noted:

> Defendants' theory against Plaintiff's recovery for negligent infliction of emotional distress mirrors that against recovery for physical injuries: that the IIA compensates emotional distress and thus precludes additional common-law damages. [But see] *Gast v. Department of Labor & Indus.*, 70 Wn. App. 239, 243-44, 852 P.2d 319 (holding stress caused by workplace rumors, innuendoes, and inappropriate comments is not IIA-compensable occupational disease), review denied, 122 Wn.2d 1024 (1993).

Goodman supra at 407. Subsequently, in Chea v. Men's Warehouse, this Court also refused an employer's attempt at trial and on appeal to argue that an employee's emotional distress caused by a pattern of aggressive workplace conduct was preempted under the IIA as matter of law.

> *First, a negligent infliction of emotional distress claim can exist in an employment context. We have recognized the claim arising in that context when it was not covered under the IIA's exclusivity provisions and the dominant feature of the negligence claim was the emotional injury.*

Chea, supra at 1265. In *Snyder*, an employer employed a supervisor who was "intimidating, threatening, belligerent, and abusive *to employees* [sufficiently] that some quit citing her as the reason." *Snyder 98* Wn. App. at 1026, emphasis added. There, the supervisor threatened Snyder with discipline when she raised concerns about salary and overtime compensation. She claimed NIED and that her preexisting PTSD required

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22 P.3d 269 (2001).

her employer reassign her to a new supervisor as a disability accommodation and left work when her employer refused that request. Although that argument was unavailing, both the Court of Appeals and Supreme Court concluded her NIED claim was not preempted by the IIA.

> We begin by noting Ms. Snyder's claim is not barred by Washington's Industrial Insurance Act, which precludes civil suits by workers for injuries or occupational diseases incurred in the course of employment. .....The claim is not based on an injury as defined by the Act (a sudden and tangible happening of a traumatic nature). RCW 51.08.100; *Wheeler v. Catholic Archdiocese,* 65 Wash.App. 552, 566, 829 P.2d 196 (1992), rev'd on other grounds, 124 Wash.2d 634, 880 P.2d 29 (1994). Neither is it an occupational injury. WAC 296-14-300 (claims based on mental conditions or mental disabilities caused by stress, including stress caused by conflicts or relationships with supervisors, fall outside the definition of an occupational disease).
> [17]

4. Young introduced sufficient evidence that his employer breached the statutory duty and public policy requiring it to provide a safe work place

It is well-established in Washington Law that "an employer has an affirmative and continuing duty to provide all employees with a reasonably safe place to work." *McCarthy v. DSHS,* 110 Wn.2d 812, 818, 759 P.2d 351 (1988) citing *Guy v. Northwest Bible College,* 64 Wn.2d 116, 118, 390 P.2d 708 (1964); *Myers v. Little Church by the Side of the*

[17] Appendix A contains the complete language of that provision of the Washington Administrative Code. The Court also noted that "Snyder fails to clearly articulate what duty she would have us impose on her employer. There is no duty for an employer to provide employees with a stress free workplace.

Road, 37 Wn.2d 897, 901-02, 227 P.2d 165 (1951); see *Ward v. Ceco Corp.*, 40 Wn. App. 619, 628-29, 699 P.2d 814, (1985). [Reversing an IIA preemption argument when the complaint alleged negligent exposure to tobacco smoke when plaintiff's resulting pulmonary condition was not covered by the Act.]

The Court stated:

> The rule that the exclusive remedy provisions of the Act bar a common law action where the claimant fails in an element of proof does not apply where the claimant cannot prove that a particular disease or injury comes within the scope of the Act.....If an employee cannot prove basic coverage, the Act's exclusive remedy provisions do not preempt a common law cause of action. To hold otherwise would deny a claimant a remedy under both the state industrial insurance system and the State's tort system.

MacCarthy, supra, cited with approval in *Goodman* In this case, it is equally clear that Young cannot prove his mental conditions are conditions covered under the Act or under the WAC.

5. Young has Produced Sufficient Evidence That anxiety disorder, panic attacks, claustrophobia, depression and other symptoms consistent with Post-Traumatic Stress Disorder were proximately caused by ongoing conduct and behavior as opposed to single traumatic injury.

As the *Chea* court noted, "Washington Courts have recognized recognize that an employer must be accorded latitude in making decisions regarding employees..... This does not mean, however, that an employer cannot be

held responsible when its negligent acts injure an employee,"[18] *Chea, supra, at 1265.*

As our Supreme Court has recognized a statutory duty and public policy to maintain a "safe work place" for its employee, the Chea court noted that threatening, assaultive and other abusive conduct can occur outside of the discipline context:

> The record contains adequate evidence for the jury to have found that the Morris incident extended beyond the acceptable realm of employer discipline when Morris grabbed Chea and also that the emotional distress claim was based both *on that incident and all of the non-racial remarks that were directed at Chea.*

Id. at 1265. Emphasis added. In *Chea,* as here, the employer disciplined the supervisor but the conduct continued. *Id.* As a result, Chea developed symptoms similar to Young's.

> Chea began to have episodes where his heart would race, he felt dizzy, weak, and nauseous, and he had trouble sleeping. Chea sought medical and psychological treatment. Chea told his doctors about the Morris incident. The doctors determined that Chea suffered from tachycardia, hyperventilation syndrome, panic attacks, depression, and adjustment disorder with anxiety.

Id. at 1263. Similarly, in *Strong* the Court stated:

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[18] In *Snyder*, the Supreme Court reaffirmed existing law that an employer has no duty to maintain a stress free workplace or take actions to discipline or even terminate employees to avoid the negligent infliction of emotional distress caused by personality or other work conflicts on the job." *Snyder, supra* at 1165. Similarly, an employer has no duty to prevent emotional distress caused by workplace discipline or termination. As a result, Snyder's NIED claim failed along with her disability discrimination claim. *Id.*

> Terrell verbally abused her daily by screaming at her and criticizing her work in a sarcastic, unprofessional manner....and that Terrell continuously made demeaning comments. Terrell spit in her face as he screamed at her for using the wrong bulletin board as a union bulletin board... [She] had had anxiety attacks, depression, and heart palpitations.

The Court noted:

> First, we note that Strong alleges facts that, if intentional, are sufficient to support fourth degree assault and support a finding that Terrell created an apprehension of battery when Strong feared he would hit her. These allegations exceed the bounds of a workplace personality dispute ...Terrell's conduct regarding Strong's personal life was not a workplace dispute, although it occurred in the workplace. Strong's allegations that Terrell assaulted her by spitting on her and threatening a battery on her sufficiently demonstrate that disputed issues of material fact remain to be decided by a jury. The trial court erred in granting Terrell summary judgment on the negligent infliction of emotional distress claim.
>
> .....
>
> We note that the jury may well determine that Terrell's conduct...is insufficient to establish negligent infliction of emotional distress, but that is a decision for the jury and beyond our review....

Strong, supra at 980, 984. As in those cases, Young has reported a series of personal attacks on him that did not solely arise out of workplace discipline or a personality conflict with Williams. The record below includes testimony from Young and gathered by the employer that even after Williams was disciplined for the September 10, 2010 "assault", he

engaged in non-work related aggressive behavior from Williams. See CP 311 and CP 324-325, (investigation of 3/27/2012 incident). CP 324 (9/27/2012 incident), his treating health care provider noted in March of 2012

> He still has problems with his supervisor at work and gets extreme anxiety with his frequent confrontations with this person

CP 1022. The mental health professional he sought soon there testified:

> ..... [H]e reported to me that he was a career employee of King County and was experiencing what he perceived as a hostile work en*vironment due to ongoing surveillance of his work activities by one of his colleagues and aggressive conduct on the job by both his then immediate supervisor and also by that colleagu*e. He also indicated that there had been an interaction some time before the intake that he characterized as an assault involving his immediate supervisor.

CP 1308.

As in *Chea* and *Terrell,* a jury should decide where the nature and extent of his distress as it does not flow from a single traumatic event. As in Goodman, Young "should be free to demonstrate the verbal harassment caused emotional injury separate from any IIA-compensable injury." *Goodman, supra*, 127 Wn.2d at 407.

VI. CONCLUSION

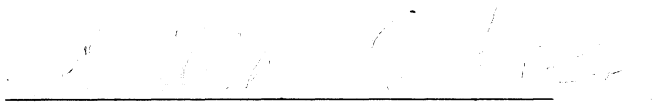
The trial court erred in not permitting Young to file his amended complaint to state express claims for hostile work environment under RCW 49.60.10 and RCW 49.60.210 and by dismissing his action for

disparate treatment discrimination under those states for race discrimination and retaliation under rule 56. The record contains disputed facts and inferences from which a jury could find that Young's race and /or opposition to what he believed to be discriminatory treatment such that are for a jury to decide.

The trial court also erred by dismissing his cause of action for negligent infliction of emotional distress as a matter of law for lack of jurisdiction when it previously found that summary dismissal of that claim was inappropriate.

Respectfully submitted this 12h day of January 2016.

LAW OFFICE OF PATRICIA S. ROSE



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Attorney for Christopher Young

APPENDIX A

INVESTIGATION	DATE AND ALLEGATION	ACTION TAKEN	CLERK'S PAPERS REFERENCE
conduct arising from 9/10 assault by Williams	9/2010 Disorderly conduct	Written Reprimand Issued	CP 117-118
Williams' Request For Investigation Into Special Use Permit Processing Actions by Young	1/2011 Dishonesty	None	CP 680
Investigation in Alleged Failure to Follow Absence Notification Procedure for Partial Day/Flex time	1/2011	Written Reprimand Issued 2/2011	CP 120-121
Requested Investigation Into Violation of An Order Related to Interaction With T-Mobile	5/2011	None	CP 131
Young Requested Investigation of Williams' Interference And Aggression During Software Testing	3/2012		CP

APPENDIX B

(1) Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease in RCW 51.08.140.

Examples of mental conditions or mental disabilities caused by stress that do not fall within occupational disease shall include, but are not limited to, those conditions and disabilities resulting from:

(a) Change of employment duties;

(b) Conflicts with a supervisor;

(c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;

(d) Relationships with supervisors, coworkers, or the public;

(e) Specific or general job dissatisfaction;

(f) Work load pressures;

(g) Subjective perceptions of employment conditions or environment;

(h) Loss of job or demotion for whatever reason;

(i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;

(j) Objective or subjective stresses of employment;

(k) Personnel decisions;

(L) Actual, perceived, or anticipated financial reversals or difficulties occurring to the businesses of self-employed individuals or corporate officers.

(2)(a) Stress resulting from exposure to a single traumatic event will be adjudicated as an industrial injury. See RCW 51.08.100.

(b) Examples of single traumatic events include: Actual or threatened death, actual or threatened physical assault, actual or threatened sexual assault, and life-threatening traumatic injury.

(c) These exposures must occur in one of the following ways:

(i) Directly experiencing the traumatic event;

(ii) Witnessing, in person, the event as it occurred to others; or

(iii) Extreme exposure to aversive details of the traumatic event.

(d) Repeated exposure to traumatic events, none of which are a single traumatic event as defined in subsection (2) (b) and (c) of this section, is not an industrial injury (see RCW 51.08.100) or an occupational disease (see RCW 51.08.142). A single traumatic event as defined in subsection

(2) (b) and (c) of this section that occurs within a series of exposures will be adjudicated as an industrial injury (see RCW 51.08.100).

(3) Mental conditions or mental disabilities that specify pain primarily as a psychiatric symptom (e.g., somatic symptom disorder, with predominant pain), or that are characterized by excessive or abnormal thoughts, feelings, behaviors or neurological symptoms (e.g., conversion disorder, factitious disorder) are not clinically related to occupational exposure.