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NO. ~~7351-7~~

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

CHRISTOPHER YOUNG,

Appellant,

v.

KING COUNTY,

Respondent.

BRIEF OF RESPONDENTS

DANIEL T. SATTERBERG
King County Prosecuting Attorney
Erin Overbey, WSBA No. 21907
Senior Deputy Prosecuting Attorney
Attorney for Respondent
King County Administration Building
500 Fourth Avenue, Suite 900
Seattle, Washington 98104
(206) 477-6549

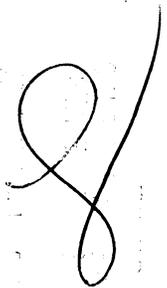


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I. INTRODUCTION

In this employment discrimination case, Appellant, Mr. Young, claims that he was treated differently than his peers and harassed by his supervisor, Mr. Williams. Both men are African American. Young claims he was retaliated against for making complaints of racism, and that the County negligently inflicted emotional distress, based on the same events. But Young's racism complaint never surfaced until he was facing a suspension, five years after Williams became his supervisor. Before that, his complaints to his union, to Human Resources (HR) and his management were about his perceived incompetence of Williams and his odd interpretation of facially innocuous emails. Certainly, it was a difficult working relationship, but the parties disagree about what caused it. Young failed to produce evidence of causation for the trial court.

Starting shortly after Williams' arrival, Mr. Halley, Young's African American peer, began reporting Young's conduct to others. Young was often late, left early, and spent time at his desk on long personal calls. When Williams asked Young to limit his personal calls, Young replied with snide comments and continued in his dilatory approach to attendance and work performance. Young's conduct toward Williams was rude, unprofessional and disruptive, but the consequences

for that were minimal. Between 2007 and 2012, Young received two written reprimands and only one was initiated by Williams.

When confronted with a potential suspension in 2012, Young did raise a claim of race discrimination and the County tried to investigate—twice. Young did not cooperate. Instead, he sent letters from his attorney about his disability, without mention of racism or retaliation. Young believes Williams is motivated by their common race because he considers Williams an “Uncle Tom”¹. But Williams supported the advancement of Young’s peer, Halley, in two promotions. He counseled *both* Caucasian and African American employees about their workplace conduct. Every concern he had about Young was vetted with HR, so that Young’s resulting low level discipline is consistent with others demonstrating the same causal attendance practices and disruptive conduct. Young’s complaints about Williams include work assignments, investigation of Young’s misconduct, and a charge of assault. But these acts happened before Young’s 2012 claim of racism and cannot be motivated that.

The trial court properly rejected hearsay and conclusory remarks, considered admissible evidence, and dismissed Young’s unsupported

¹ “Uncle Tom” is defined as follows: noun, Disparaging and Offensive.
1. a black man considered by other blacks to be subservient to or to curry favor with whites. <http://dictionary.reference.com/browse/uncle-tom>

claims of racism, retaliation and hostile work environment. The transcript from the CR 56 hearing confirms that the trial court *did* consider Young's claim of hostile work environment. The court even encouraged counsel to focus oral argument on this issue because she wanted more information in order to rule. The court acted well within its discretion, and consistent with RCW 4.92.100, when rejecting new allegations, based on post-complaint conduct. After summary judgment, only Young's claim for negligent infliction of emotional distress survived.

In a separate challenge to the court's jurisdiction on Young's remaining claim of negligent infliction of emotional distress, the court agreed that Young's mental condition, PTSD, is more properly evaluated before the Board of Industrial Appeals. Young's attorney and his therapist agree that his mental harm dates back to 2010, when Young claims he was assaulted by Williams. Although this injury was not diagnosed for two years, Title 51 provides that an injury caused by a sudden and traumatic workplace event is subject to adjudication under the Industrial Insurance Act (IIA). Young may reopen his 2010 physical injury claim and seek recovery through the no-fault process under the IIA. He should do so.

The trial court should be affirmed in all respects.

II. ISSUES ON APPEAL

2.1 Young can avoid summary judgment of his race discrimination claims by producing evidence that similarly situated peers outside his protected class were treated more favorably than he was or with direct evidence of racial animus. Young lacks admissible evidence of disparate disciplinary or hiring practices, but contends his African American supervisor was “Uncle Tom” and treated him unfairly to curry favor with management. Is Young’s perception sufficient to avoid dismissal of his racial discrimination claim?

2.2 For his hostile work environment claim, Young must produce evidence that Williams’ conduct created an objectively abusive working environment and did so because Young is African American. Williams sought investigation or discipline for Young’s conduct 3 times in 5 years, only one complaint led to a written warning, and was himself disciplined for pushing Young’s hand away during a dispute. Did Young meet his burden of producing evidence of an objectively hostile work environment?

2.3 To support his claim of retaliation, Young must show that the alleged retaliator, Williams, was aware of his protected conduct when he engaged in adverse employment actions. But Williams was unaware of both Young’s workers compensation claim and claims of racism until *after*

counseling Young, initiating workplace investigations, or engaging in workplace disputes with Young. Since Williams lacked knowledge needed to retaliate, should the retaliation claim be dismissed?

2.4 For all discrimination claims, including retaliation, Washington law requires dismissal if an employer provides a legitimate reason for its actions and the plaintiff is unable to offer evidence that the given reason is a pretext for discrimination. Aside from speculation on hiring practices and comparable discipline, Young offers no evidence that the County's explanation for minor discipline and coaching is a pretext for discrimination. May Young's claims also be rejected for lack of pretext evidence?

2.5 A plaintiff alleging negligent infliction of emotional distress in the workplace must show that the claim is not covered by the Industrial Insurance Act and is not due to workplace dispute or employee discipline. There is no legal duty to provide stress-free work environment. Young's attorney and therapist contend that a 2010 "assault", covered by the IIA, and co-worker surveillance cause his mental illness. Does the trial court have jurisdiction over Young's mental illness injury claim? Does co-worker surveillance violate the County's legal duty as an employer?

2.6 Trial courts have discretion to deny a motion to amend a

complaint, particularly if there is prejudice to the defendant. Here, the trial court considered the newly articulated hostile work environment allegation in Young's amended complaint and only denied amendment of new facts or claims arising after the filing of the complaint. Was it an abuse of discretion for the trial court to deny amendment of the complaint regarding new factual allegations and theories of liability after the close of discovery and plaintiff's deposition?

III. STATEMENT OF THE CASE

A. Appellant Never Complained of Racism or Retaliation Until Faced With a Proposed Discipline and Failed to Cooperate When HR Attempted to Investigate.

The following undisputed events serve as the backdrop for Young's claims of discrimination and retaliation in the workplace:

- 2007** Doug Williams becomes Young's supervisor. CP 677.
- 2008** Co-worker, Aaron Halley, begins to complain about Young's conduct at work. CP 136-37.
- 2009** Co-worker Wendy Siao complains of "an unsafe work environment" created by Young. CP 283.
- 2010** Young and Williams have a physical encounter, which Young reports as an assault; both are issued written reprimands. Young's two written statements on the incident contain no claim of racism. CP 109-111; 447-449; 451.

- 2011** Young receives a written reprimand for failing to follow attendance policies. Williams' complaint of insubordination is investigated but HR does not impose discipline. CP 105-06; 120-122;127-31.
- 2012** Young loses his temper and disrupts training, yells at Williams and leaves work. After receiving a proposed suspension for this conduct, Young's union claims that race is a motivating factor. Young does not cooperate with attempts to investigate the racism claim, but his attorney asks for a workplace accommodation. CP 163; 227; 294-437.
- 2013** One external and one internal co-worker complaint are received concerning Young's conduct at work. He is not disciplined for either incident and Williams is no longer his supervisor. Young files his tort claim after the second unsuccessful attempt to investigate his race claim. CP 222; 298,290; 337-38; 340; 441-444; 778-786.

Young's claims focus on his former supervisor, Doug Williams.²

CP 441-444; 4. Williams began supervising Young in 2007, along with three other Real Property Agents (RPAs) in Real Estate Services (RES), a division of the Facilities Management Department (FMD) at King County. CP 223. Williams was tasked with lessening the backlog of permit work in his unit and he developed reporting expectations for all the RPAs to help him track permit progress *Id.* Initially, Williams found Young was helpful and supportive of the goals, until they had a discussion on Young's desire to be reclassified to a higher paying RPA title. CP 223. Williams told

² Young testified that he could not think of anyone else who discriminated against him besides Doug Williams. CP 462.

Young he did not think Young was working at the highest level (RPA IV), but also that he felt Young could get there. *Id.* After that, Young's demeanor toward Williams changed. *Id.*

Young became argumentative and rude in his dealings with Williams. Both Young's peers and the unit's Manager observed this rude and unprofessional conduct. In 2009, Young's peer, Wendy Saio complained of an "unsafe work environment", based on Mr. Young's conduct. CP 283. Saio described Young's rude and bullying behavior directed at her and Williams. *Id.* And she was not the first to complain.

FMD expected its non-hourly employees, such as RPA's, to adhere to their approved work schedule. CP 300-301; 386-397; 398-411. Young's RPA peer, Halley, began to keep notes in 2008 on Young's late arrivals, early departures, excessive and lengthy breaks, and his use of work time to conduct personal business when he was in the office. CP 135-161. Halley complained to Williams and Williams attempted to get Young to comply with attendance policies, but Young was the only employee who regularly disregarded Williams' directions. CP 223-224; 241-255; 256-260.

Young routinely failed to provide advance notice of his planned absences. *Id.* Instead, he would send an email as early as 11:30 a.m., on his way out the door, noting his appointment and intent to be out the rest

of the day. CP 262-281. A pattern developed so that Young used his FLSA status to come and go for lengthy periods, with little notice, often reporting illness on a Friday or Monday. CP 223. Eventually, Williams sought assistance from HR regarding Young's attendance issues and HR issued a February 2011 written reprimand for Mr. Young concerning attendance and workplace expectations. CP 225-226; 223; 261-281.

In addition to attendance expectations, Young was reminded in February 2011, to utilize the supervisory chain to address workplace issues; ask clarifying questions rather than argue with instructions; refrain from assigning fault in meetings; and control his voice tone, level, and negative content. CP 119-122. This notice came from HR and his manager. *Id.* The notice was not successful and his manager, Steve Salyer, had to remind Young a year later that his emotional outbursts and accusations during work meetings were unacceptable. CP 177. This email followed Salyer's observation of Young's disruptive behavior during meetings and multiple counseling sessions. CP 174-175. Young's complaints to Salyer were not about race or retaliation, but Young's belief that Williams did not understand the work of the unit and made mistakes as a result. CP 173.

Young's emails show that he was not hesitant to complain about or

criticize Williams, but he attributed motives other than race or protected activity to Williams' actions. Young complained to his union that Williams "has no understanding of our processes nor can he tell the truth, he is in total denial of his short comings". CP 846-825. He opined "as long as you agree with him (pad [h]is ego or your resume is padded with degrees) you will be rewarded". CP 846. When Williams gave Young direction on a status report he wanted to see on outstanding permits, Young reported to his union, "This is just harassment on his part....his attitude is one of if you question him you pay the price". CP 836-837.

Young admits that he is unable to identify a date when he reported racially biased conduct by Williams. CP 742. Though he complained about Williams to his union representative, as early as 2009, Young's complaints were about Williams' competence as a supervisor. CP 817; 836-837; 838-840; 842-852. Young characterizes emails with Williams as "a pattern of harassment and retaliation", but admits he thought that Williams' lack of knowledge and incompetency were the motivating factors, and not his race. *Id.* He continued to hold that belief for at least two years. CP 819. Records show it was not until he was faced a proposal for a five day suspension in 2012 that Young's union representative raised a claim of racism. CP 314-317; 381-319; 165-167; 167-170.

In March of 2012, while training with a vendor on a new program used by RES, Young became frustrated and got up to leave before the training was complete. CP 302-313. Young believes that Williams attempted to block him from leaving, but by all accounts he did leave, and Williams followed him. CP 303-05; 310-12 Both Williams and Young were speaking loudly and both were investigated for their conduct that day. *Id.*; CP 295. During a pre-disciplinary meeting Young said he was questioned about his conduct without notice of the potential for discipline and that created a procedural concern about discipline. CP 295-96.³

B. Attempts to Investigate Youngs Claim of Discrimination and Retaliation are Unsuccessful When Young Provides No Information to Investigators.

While no discipline was ultimately imposed on either Young or Williams for the training day outburst⁴, the FMD HR manager, Alan

³ The investigator, Mr. Salyer, took a statement, according to Young and his union, without telling Young or his union that Young was being investigated for potential misconduct. CP 307. Under *NLRB v. Weingarten*, 420 U.S. 251 (1975), employees have the right to be accompanied and assisted by their union representatives at investigatory meetings that the employee reasonably believes may result in disciplinary action. *Weingarten* rights are applicable to public employees who exercise collective bargaining rights under Chapter 41.56 RCW. Okanogan County, No. 2252-A, 1986 WL 309485, (Wash. Pub. Emp't Relations Comm'n 1986). If an employee interview is held contrary to *Weingarten*, the employer must show that "its decision to discipline the employee in question was not based on information obtained at the unlawful interview" *Kraft Foods, Inc.*, 251 N.L.R.B. 598 (1980).

⁴ The HR manager, Momohara, was concerned that Young and Williams did not receive proper notice of his right to union assistance. CP 296; 298. He recommended a written reprimand instead of suspension, which was drafted, but there is no indication the letter ever went to Mr. Young and it is not contained in his personnel file. CP 298.

Momohara, tried to investigate the racism and retaliation allegations. CP 296. First, he attempted to meet with Young “to get more details on why you believe that Doug Williams is engaging in retaliation and possibly racial discrimination” in July, 2012. CP 318-319. When the meeting had to be rescheduled, Momohara arranged for his peer, Ms. Hansen, to take the meeting. CP 320-322. At the meeting, Young and his attorney provided Hansen with a letter about Young’s need for a workplace accommodation and no information on the claim of racial bias or retaliation. CP 163-164; 165-167. Young said he would provide details about his racism claim to Momohara, within two weeks, but he never did so. CP 168-170; 297. Months later, Young’s attorney wrote another letter, also about workplace accommodations, still without information on the claim of racial bias or retaliation. CP 323-325.

In March of 2013, Momohara made another attempt to investigate the discrimination allegation, but Young and Halley were unwilling to participate. CP 297. An investigator contacted Young and his union representative, with the intention of conducting an interview to learn facts related to the discrimination claims. CP 866-867. The union representative wrote to the FMD Director, and described the investigation as a waste of

time, but the attempt to investigate continued. CP 867. The investigator did set a meeting with Young and his newest attorney, but they did not allow an interview of Young. CP 868; 869-870. Without any participation from Young or Halley, the investigation went no further. CP 868; 296-297.

Mr. Williams, as the subject of the complaint of racism, did not receive notice of the charge of racism until March of 2013, when he received a letter with this allegation. CP 683. By then, he was no longer supervising Young. CP 676. He was also uninvolved in Mr. Young's workers compensation claims, until he was asked to provide testimony, which was taken in December, 2012. CP 229; 566, 659-661.

C. Young's Minimal Discipline Follows Documented Misconduct and Review by Human Resources and Other Management.

Over the course of five years, Williams sought investigations or potential discipline three times. First, he sought HR assistance in 2011 after multiple reminders on attendance were unsuccessful. CP 105-106; 224-225. In this instance, a written reprimand was imposed. *Id.* He also complained about an incident when he believed that Young acted contrary to his instructions on a complicated permit process, but this resulted in no discipline. CP 126-131. Lastly, he contacted HR for advice on Young's

attempt to close outstanding permits without following proper steps, but this did not even result in an investigation. CP 105-106.

In each case, Williams' concerns were evaluated by an HR manager who concluded that Williams' concerns were reasonable, but that most of the conduct did not provide a reason to investigate or impose discipline. *Id.* HR viewed Young as largely uncooperative in his interactions with Williams. CP 106-107. Three RPA peers also complained to HR about Young's conduct, and yet the most significant discipline Young ever received is the two written reprimands CP 112-113; 115; 117-118. Despite all the contact with HR, Young did not make claims of racism or retaliation; he told HR that Williams was not a good supervisor because he didn't know how to do the permitting work and could not effectively supervise the work of the permitting unit. CP 106.⁵

Nor did Young mention race as a motivating factor following the most serious act he attributes to Williams. Following an outburst that resulted in physical contact, Young provided two contemporaneous statements about the incident on September 10, 2010. CP 447-449; 559-564. He wrote his second statement after he had more than a month to reflect on the event and several weeks after receiving a written reprimand

for his part in the incident. CP 559-564. The investigation included a statement from a witness other than Williams or Young, who reported that Young thrust his hand toward Williams' face and told him to "shut up". CP 109-113. The events on September 10, 2010 also resulted in Young filing an injury claim under the IIA, seeking compensation for the injury. CP 966-967.

D. Young's Therapist and Attorney Conclude That His Mental Health Conditions Date Back to the Same "Assault" that Resulted in Physical Injuries Accepted For Worker's Compensation.

Young complains that on September 10, 2010, Williams, grabbed his arm, pulled and twisted it, causing him injury. CP 5. Young filed a workers compensation claim, including a description of this event. CP 966-967. His claim was allowed, and he sought treatment. CP 968-970. On August 30, 2011 the Department of Labor and Industries closed the claim without finding any permanent disability. CP 971-973. Young appealed the closure, but later withdrew his appeal and it was then dismissed. CP 974-976; 977-980. He did not seek coverage for any mental health conditions. CP 974-976. During discovery, the County received medical records from a therapist who diagnosed Mr. Young with

⁵ Young believes that after he complained to HR and management about Williams' lack of knowledge, Williams began to retaliate. CP 527-528.

PTSD, based on Young's report of harm dating back to 2010.

In April 2012, Young sought an assessment from therapist Jackson-Williams. CP 939-964. As part of the assessment, Jackson-Williams questioned Young on a number of topics and reported, "Mr. Young first became aware that he might have some mental health problems "shortly after being asserted⁶ by [his] supervisor...Young reported that he relives his physical assault often". CP 962. Young's paperwork includes his report of experiencing fear, panic attacks, recurring thoughts about a trauma and flashbacks of the trauma "since 2010". CP 953. He also reported that an "assault" by his supervisor in 2010 was one of the most stressful things in his life in 2012. CP 951. Jackson-Williams diagnosed Young with Posttraumatic Stress Disorder and Panic Disorder (PTSD). CP 963.

In July 2012, Young authorized his attorney to write to the County about a workplace accommodation. CP 933-935; 936-938. The letter said that Williams caused injury to Mr. Young during the incident in September 2010, which "resulted in Mr. Young becoming an individual with a disability that impacts one or more major life functions. The condition of anxiety and panic attacks affect Mr. Young's central nervous

system and his ability to breathe normally.” CP 938.

E. The Trial Considered and Rejected Young’s Hostile Work Environment Claim, Except for Post-Complaint Allegations

Young’s complaint sought relief on five theories: discrimination based on race, retaliation, assault and negligent and intentional infliction of emotional distress. CP 8. Before summary judgment, Young voluntarily dismissed his claim of assault, as it was well beyond the two year statute of limitation. CP 54. Young presented no opposition to dismiss of his claim of intentional infliction of emotional distress. CP 694-713. On the eve of summary judgment, Young attempted to amend his complaint. CP 586.

There were significant differences between Young’s complaint and Amended Complaint. For example, Young identified new people that he contended were responsible for the wrongful conduct. CP 36. At deposition, Young was specifically asked who, other than Williams, discriminated against him. He replied, “can’t think of anyone else at this point in time”⁷. CP 462. While Halley was not mentioned in the

⁶ This word “assert” seems to be a typo used instead of assault, since the sentences that follow make reference to physical assault, which Young claims to relive. CP 962.

⁷ “This point in time” is more than two years after he reported to a therapist that a fellow employee taking notes on his actions at work and forwarding to his supervisor. CP 951. Obviously the information was not new, nor information only learned in discovery.

complaint, he is identified in the amended complaint for engaging in “violent and or abusive conduct” including surveillance of Plaintiff’s conduct in the workplace”, which the County allegedly ratified. CP 36. The Amended Complaint alleges that Williams was motivated by Young’s attempt to secure workers compensation benefits (a new protected activity) and that acts of both Williams and Halley were “condoned” by unidentified managers and speaking agents. CP 36. It is undisputed that Williams was unaware of the workers compensation proceeding, until asked to testify and that testimony was taken in December, 2012. CP 229; 660-661; 455-456; 566-67.

The Amended Complaint included substantially revised factual allegations at paragraphs 4.13-6.5 and 7.2-7.3. See CP 2-8; 34-37; 38. These changes were made after the discovery cutoff, after Young was deposed on the basis for his claims; and during the Christmas holiday week, three days before the County filed its summary judgment motion. CP 586. Additionally, some of the new allegations were contrary to plaintiff’s sworn testimony. Young’s amended complaint alleges that he notified his management of a hostile work environment, but management failed to act and ratified Mr. Halley’s surveillance of Young. But uncontroverted evidence shows that Halley did not act at the direction of

management and Williams actually discouraged Halley's reports. CP 873.

⁸ Young testified that he did not believe Halley was motivated by race. CP 604-606.

With respect to motivation to retaliate, the only evidence is that Williams became aware of racism charges in 2013, and of the workers compensation proceeding in December 2012, after Williams was transferred and no longer supervising Young. CP 229. Young's "notice" to management concerning racism was a vague analogy about favoritism. Young told managers if he "told Mr. Williams it was raining outside, if it was raining and [another unidentified person] told him it was 100 degrees, [Williams] would run outside with his bathing suit on". CP 582. Young told these stories, rather than provide factual allegations "because Mr. Williams is black and most people don't see black on black racism the way we do". CP 582. The County objected to the extensive changes to the complaint because the amendments were untimely, at odds with the evidence, and included new allegations of retaliation by other actors, after Young's complaint, that were not preceded by a tort claim. CP 578.

Although the County objected to Young's hostile work

⁸ Given that Young has no personal knowledge of ratification and that both Halley and management agree that Halley was not asked to surveil Young, but encouraged to do the opposite, this allegation does not meet CR 11 requirements. CP 34; 225; 299-300.

environment claim in its summary judgment motion, the Court did consider that claim. VRP filed 09/22/2015 Page 2.⁹ Before hearing argument, the court said she *was* considering the hostile work environment claim. She said, “*I want to hear about the hostile work environment more than any of the other claims*”. VRP 6. She informed counsel she was “willing to revisit” an order denying Young’s motion to amend his complaint with respect to the hostile work environment allegation. VPR 1-6. Young’s counsel sought clarification on the scope of claims under consideration and specifically referred to the hostile work environment claim “based on new events and/or based on [Young’s] Worker’s comp claim”.

The court instructed counsel to be “over inclusive rather than under inclusive” in presenting argument and noted that events after 2013 would not be considered, due to the lack of a tort claim. VRP 7-8. In a follow up conference the court provided even further clarification, stating “to the extent there’s any ambiguity, the hostile work environment claim was dismissed”. VRP 59.

⁹ Plaintiff’s Counsel filed the Statement of Arrangements indicating her intention to have the January 23, 2015, February 20, 2015 and April 30, 2015 hearings transcribed. A subsequent verbatim report of proceedings was filed on September 22, 2015. All references to the Verbatim report of proceedings will be cited with the prefix VRP followed by the transcript page number.

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *Kuhlman v. Thomas*, 78 Wn. App. 115, 119, 897 P.2d 365 (1995). An order of summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). While facts are viewed in a light most favorable to the nonmoving party, that party must set forth specific facts to defeat a motion for summary judgment. *Kuhlman*, 78 Wn. App. at 119-120. P.2d 728 (1996); *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 255–26, 770 P.2d 182 (1989).

“[B]are assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence.” *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 93 (2000). Moreover, conclusory or speculative statements, such as a belief that employer action is based on protected status, is not enough to survive summary judgment. *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 85 (2004); *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66 (1992). In discrimination cases, the plaintiff must establish specific and material facts to support each element of his or her prima facie case. *Marquis v. City of*

Spokane, 130 Wash.2d 97, 105, 922 P.2d 43 (1996).

A motion to amend a complaint is left to the sound discretion of the trial court whose determination will be overturned on review only for an abuse of that discretion. *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). Discretion is abused if it is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

B. SINCE THE TRIAL COURT CONSIDERED YOUNG'S HOSTILE WORK ENVIRONMENT CLAIM AND ONLY REJECTED ALLEGATIONS POST DATING HIS COMPLAINT, SECTION V (A) OF APPELLANT'S BRIEF IS MOOT.

Trial court denial of a plaintiff's motion for leave to amend a complaint is reviewed for a manifest abuse of discretion. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 737, 837 P.2d 1000 (1992). Undue delay, which works a hardship or prejudice on an opposing party, constitutes sufficient reason for denial of leave to amend. *Appliance Buyers Credit Corp. v. Upton*, 65 Wash.2d 793, 800, 399 P.2d 587 (1965). Hardship or prejudice includes the need to find and disclose new witnesses and experts, reformulate defense strategies and the disruptions of an already set case schedule. See *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn.App. 192, 199–200, 49 P.3d 912 (2002). Prejudice may be established by the circumstance shown in the record. *Id.*

A trial court may also consider whether the amendment would be futile. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142 (1997).

Young's argument on amendment is largely moot, since the court considered the briefing on the hostile work environment claim; revisited its order denying amendment of the complaint and specifically sought argument on the hostile work environment claim. VRP 7-8, CP 709-713. On this record, it must be presumed that the trial court considered Young's "new"¹⁰ factual allegations that predate filing of the complaint, like the accusation that Halley engaged in "violent and or abusive conduct" including "surveillance of Plaintiff's conduct in the workplace", which was "ratified" by the County. CP 36; 38; 738; 741.

The amendments relating to Halley as a co-conspirator are completely at odds with Young's deposition testimony that he "can't think of anyone else"¹¹ who discriminated against him other than Williams. CP 462. Young also testified that he was "well aware" of Aaron Halley's complaints about him which began "day one" of Halley's employment. CP 603-604. He believes Halley's actions were motivated

¹⁰ Young's 2012 report to his therapist included a claim that his co-worker was watching him and reporting to management, so the information used to amend his complaint to include allegations relating to Halley was hardly new. See CP 1038.

¹¹ "This point in time" is more than two years after he reported to a therapist that a fellow employee taking notes on his actions at work and forwarding to his supervisor. CP 951. Obviously the information was not new, nor information only learned in discovery.

not by his race, but his interest in power. CP 604; 606. Indeed, when asked about Halley's motives, Young testified, "I can't speculate to what his motives are". CP 603-604; 606.

But Young does speculate that Halley was attempting to curry favor with management, even though he does not know of any benefits Halley received in return for complaints about Young. CP 604-605. It is undisputed that Halley was never asked to spy on his Young by his management. CP 673; 873. Young's speculative assertions are not sufficient to avoid summary judgment. *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 85. Even if the court denied this particular amendment to the complaint, it is well within the court's discretion to deny such a futile revision.

Young also sought to revise his retaliation allegation to include a charge that Williams' adverse treatment of Young was motivated by Young's attempt to secure benefits in a workers compensation proceeding. CP 38. Again, the undisputed evidence supports a dismissal of that claim, as well as the refusal to allow for such a futile amendment to the complaint. To establish the causal connection between protected activity and an adverse employment action, a plaintiff must show that retaliation was a substantial factor motivating the employer's action. *Francom v. Costco*

Wholesale Corp., 98 Wn. App. 845, 862, 991 P.2d 1182 (2000). As a matter of logic, retaliation cannot be a —substantial factor— or indeed *any* factor — in a decision if the decision maker did not know about the protected activity. See *Wilmot v. Kaiser*, 118 Wn.2d 46, 69, 821 P.2d 18 1991); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (“Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity”).

It is undisputed that Williams was unaware of Young’s pursuit of workers compensation benefits until his testimony in December of 2012. CP 229; 453-49; 566-572. Young does not identify any adverse action by Williams that post-dates Williams’ knowledge of the workers compensation activity and by 2013 Williams was no longer his supervisor. CP 222. This retaliation theory fails because Williams lacked the requisite knowledge to be motivated by Young’s workers compensation activities, until the end of 2012. After that, the claim fails because there is no adverse employment¹² action by Williams sufficient to establish this claim. Again, the court could properly deny such a futile amendment if it chose to do so.

¹² See Section D, *infra*, concerning what constitutes an “adverse action”. Young’s only identified adverse action after Williams’ notice of a workers compensation hearing is an incident when he claims that Williams snatched papers out of his hands by a copier. CP 743; 755. This act is not sufficient to meet the objective standard that applies when evaluating an adverse employment action.

Additionally, all revisions in the amended complaint were untimely, provided well after the deposition of Young and on the eve of a dispositive motion and/or trial. Obviously, the County was unable to conduct meaningful examination of Young during the discovery, since Young waited until after his deposition and the close of discovery to disclose significant revisions to his allegations. CP 586. The timing of the amendment required the County to reformulate defense strategies and to disrupt an already set case schedule, to the extent further discovery was needed to prepare for trial. *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn.App. 199–200. The court was entitled to reject the amendments based on prejudice to the County, to the extent it did so.

Young also sought to add allegations concerning incidents that occurred *after* the date of filing his complaint. CP 46. However, the County is entitled to receive a tort claim on all new allegations because the requirements of RCW 4.92.100 and 4.92.110 are mandatory and operate as a condition precedent to recovery. *Levy v. State*, 91 Wn.App. 934, 942, 957 P.2d 1272 (1998). The pre-claim notice requirements of RCW 4.92.110 apply to a state law discrimination action, which is characterized as a tort. See *Blair v. Washington State University*, 108 Wash.2d 558, 576, 740 P.2d 1379 (1987). Failure to comply with the filing

requirements ordinarily results in the dismissal of the suit. See, e.g., *Levy*, 91 Wash.App. at 944, 957 P.2d 1272; *Reyes v. City of Renton*, 121 Wash.App. 498, 502, 86 P.3d 155 (2004). The court correctly rejected Young's attempt to add new post-complaint allegations.

Finally, the court could have rejected plaintiff's summary judgment response entirely, due to Young's failure to file a timely opposition. *Idahosa v. King County*, 113 Wn. App. 930, 936, (2002)(trial court properly struck response to summary judgment that was two days late). The County objected to Young's untimely opposition to summary judgment, filed two days after it was due. CP__ (Morrison Dec., ¶ 2.). Despite the objection, the court considered Young's opposition, including authority on a hostile work environment--except for the allegations post-dating his 2013 complaint VRP 3-56. Young's arguments relating to amendment to the complaint are either moot or they fail to establish an abuse of discretion by the trial court.

C. YOUNG FAILED TO PRODUCE EVIDENCE THAT OBJECTIONABLE CONDUCT WAS MOTIVATED BY HIS RACE.

To establish a prima facie case for disparate treatment, plaintiff must prove that (1) he is a member of a protected class, (2) he was treated

less favorably than a similarly situated¹³ non-protected employee, and (3) the non-protected employee was doing the same work. *See Clarke v. Office of the Attorney Gen.*, 133 Wn. App. 767, 788-89 (2006). A plaintiff may also rely on direct evidence of impermissible bias to show disparate treatment. *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014).¹⁴ At summary judgment, his claim is evaluated under the burden-shifting scheme from *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *See Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001); *See also Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 370-71, 112 P.3d 522 (2005). Under the *McDonnell Douglas* burden-shifting scheme, the plaintiff must first set forth a prima facie case, and if the plaintiff cannot make such a showing, then the defendant is entitled to summary judgment. *Hill*, 144 Wn.2d at 181.

If the plaintiff produces evidence to support the elements of a prima facie case, then the defendant has a burden of production to provide

¹³ A comparable employee in a discrimination analysis is someone “subject to the same standards and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.” *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992); The plaintiff and the comparators must be similarly situated in all material respects. *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir.2006). They should have the same supervisor and be subject to the same standards. *Kirby v. City of Tacoma*, 124 Wn.App. 454, 475 n. 16, 98 P.3d 827 (2004).

a legitimate non-discriminatory reason for its action. *Id.* If the defendant meets this intermediate burden of production, then the burden of proof shifts back to the plaintiff to show that the stated reason is pretextual. *Id.* at 182. If the plaintiff does not have any evidence to show that the reason given is a pretext for discrimination, then the defendant is entitled to summary judgment. *Id.* Summary judgment may be granted in favor of an employer even when the employee has created a weak issue of fact concerning pretext, if abundant, uncontroverted, independent evidence indicates that no discrimination occurred. *Tyner v. Dep't of Soc. & Health Servs.*, 137 Wn. App. 545, 564 (2007). Trial is only required if all three burdens have been met and there are reasonable but competing inferences from the evidence. *Hill*, 144 Wn.2d at 186.

Young's theory is that Williams is an "Uncle Tom", attempting to curry favor with his Caucasian management.¹⁵ Young testified:

My feeling with Mr. Williams is this: There are certain people that don't like their own ethnic background for whatever reason or try to, how I put it -- I'm going to be very vulgar and blunt right now. Can I do that?

¹⁴ In *Scrivener*, the hiring authority directly referred to age and the college provided vague information to support its legitimate reasons in a hiring process. These facts were sufficient to preclude summary judgment. *Scrivener v. Clark College*, 181 Wn.2d 439.

¹⁵This is not the same as the discrimination theory Young provides in his opening brief, concerning discrimination based on skin color between members of the same race. Brief at 1-2. There is no evidence in this record concerning whether Williams is lighter skinned than Young.

Q. I want your truthful testimony. Absolutely.

A. There are three types of niggers in this world. There's the house nigger, the field nigger, and the porch nigger.

Q. Which one are you in this scenario?

A. Neither because I'm not -- I'm just saying that's a phrase that they used to use back in the day. Now usually that porch, the guy that's sitting on the porch would tell on the guy in the field for taking an extra potato and sticking it in his pocket, or tell on the person that's working in the kitchen that they gave somebody some extra food trying to curry favor with the plantation owner.

Follow what I'm saying? That's Mr. Williams

Q. So Mr. Williams is the porch nigger in that scenario. And who are you in that scenario, the field --

A. Yeah, I'm out in the field. I'm just trying to survive and take care of my family and I'm staying out of the way but I'm not trying to curry favor with anybody else. My thing with that, that scenario is something that within the black community we know. Uncle Toms, things of that nature. People that do things. My family, we don't deal with that. We call them people that like to climb ladders, you know, they're ladder-climbers. They will say and do or present themselves in any way to try to move up the ladder, break through the glass ceiling, whatever you call it. We all know them. That's Mr. Williams.

CP 474-475.

While Young is entitled to his perception of what motivated his supervisor's management decisions, his belief that Williams is "Uncle Tom" is not sufficient to avoid summary judgment.

Young also argues that Williams demonstrated bias in hiring decisions, but he lacks foundation to provide anything other than the

evident race of peers hired when Williams supervised the RES group.¹⁶ Since Young lacks knowledge of the hiring processes and did not seek such information in discovery, his opinion is nothing more than a guess. CP 811. It is undisputed that Williams supported Mr. Halley's promotion to an RPA II and III. CP 682; 133. Though Williams lacked hiring authority, Caucasian Alex Perlman was referred to Williams by Career Support¹⁷ with the directive he "must be interviewed and hired provided there are no compelling reasons to decline to hire the candidate". CP 864-865; 223-224; 225-226; 241-255. Williams also utilized a retiring employee for a short term, half time, assignment to help reduce permit backlogs, and not as an alternative placement for any applicant of color. CP 871-872; 874-880. Caucasian Matthew Burke, another hire during Williams tenure, was the second highest scoring applicant in that process. CP 872-873. The higher scoring candidate, Ms. Dekhordi-Westerlund¹⁸,

¹⁶ The County moved to strike portions of Young's declaration on a variety of bases, including lack of personal knowledge. CP 805. While the court did not specifically rule on the County's motion to strike, the court properly disregarded declaration testimony not supported by personal knowledge or based on speculation. Summary judgment affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Blomster v. Nordstrom*, 103 Wn.App. 252, 259-60 (2000); CR 56(e).

¹⁷ At the County, a laid off employee who meets the qualifications for an open job is entitled to placement without competing with other qualified applicants. CP 864-865.

¹⁸ Williams noted this applicant spoke with an accent, suggesting that English is her second language but his hiring materials did not contain information on race or origin and that was not information he took into account in recommending her for hire. CP 872-873.

sought a higher salary than Williams could offer and declined the position.

Id.

Young also believes that the County was overly harsh in imposing discipline, but the only evidence on disciplinary comparators was submitted by the County. Again, because he failed to conduct any discovery on this theory, Young is speculating that he was treated less fairly than others engaging in similar conduct. The County presented evidence of many other employees of the same department, including a professional (engineer) who were disciplined for failing to comply with the attendance policy and also for rude and disruptive conduct. CP 326-355; 398-411; 431-433. Notably, Williams himself received a written reprimand for his part in the Sept. 10, 2010 incident, referred to as disorderly conduct. CP 431-433. Williams also counseled Young's Caucasian peers Burke and Perlman on their conduct and HR investigated both Young and Perlman in response to a complaint by outside party, in 2013. CP 336-338; 227-228. While other staff responded to coaching and counseling, Young did not and therefore Williams did support discipline in 2011. CP 227-228.

Young's own contemporaneous statements, and silence, do not support his claim of racial bias in discipline. After a physical

confrontation with Williams in 2010, Young gave two statements, and neither mentioned race as a motivating factor. CP 447-449; 451. The second statement was a month after Young had time to reflect on the incident and provide his thoughts. CP 447-449. Then, Young had another chance to provide evidence of racism, after his union raised the issues of racism and retaliation in response to proposed discipline in 2012. CP 769. HR specifically met with Young to gather evidence of improper racial bias or retaliation, but Young and his attorney provided no information on that subject. Young said he would provide it later, but did not. CP 163-164. The following year there was another attempt to investigate racism, but Young, again with an attorney in attendance, provided no information to support the claim. CP 867-868. Indeed, Young's attorney wrote two letters to the County about his workplace concerns, but neither mentions his claim of racial bias or retaliation. CP 166-167; 324-325.

Ultimately, Young was never even disciplined for his outburst during a training exercise in 2012, even though a five day suspension was recommended. CP 297-298. He and Williams were treated equally in that instance, as both were investigated for their role in the incident. CP 302-305. Concerns over the process in the investigation led to a decision to decrease actual discipline, but the intended written reprimand was never

imposed. CP 297-298. This investigation is not an action that Young can attribute to Williams, as there is no evidence that Williams either initiated this process or improperly influenced the outcome.¹⁹ Actually, this is an example of a functional pre-disciplinary process where the decision-maker considers the investigation and all responses and, when appropriate, revises the proposed discipline.

Even setting aside the issue of whether Young presents any circumstantial evidence of racial bias, the County provided legitimate reasons for the minimal discipline imposed on Young. Young was disciplined, consistent with other employees for his disorderly conduct on September 10, 2010. CP 431-433; 109-113. In reaching a conclusion, the County had evidence from third party witness Burke, indicating that Young was the aggressor when he thrust his hand in Williams' face and told Williams to "shut up"²⁰. CP 109-113. In 2011, there was a record of ongoing attempts to get Young to comply with an attendance policy that he regularly disregarded. CP 223-224; 242-255; 256-260. HR reviewed the request for discipline from Williams and agreed that a written

¹⁹ Again, since Young testified that racist motives were only attributed to Williams, he cannot create an issue of fact by changing that answer and now directing the same theory at others in his supervisory chain. CP 462; 71.

reprimand was appropriate, so HR approved it and presented it to Young. CP 105; 120-122. In two other cases when Williams sought discipline or investigation of Young, HR disagreed, but found Williams' expectations were reasonable. CP 105-106. And 2011 is the last time Young was disciplined.

While there were other investigations into Young's conduct, they were initiated by peers, such as Aaron Halley, Matthew Burke, Wendy Saio and even external complainants. CP 283; 337-338; 340-341; 136-161. Halley complained, again, in 2014 about Young's malingering and poor attendance. CP 298-299. A review of Young's website usage and entrance and exit card swipes, supported the complaints by Halley and the County disclosed that investigation in response to a discovery request.²¹ CP 346-385. Saio complained that Young created an unsafe work environment. CP 224-225; 282-283. Burke complained that Young's conduct was "moving toward violence", and external complainant Townsend, reported unprofessional conduct during a meeting that he attended. CP 337-338. Young complained about the 2010 incident which led to HR's

²⁰ While the County acknowledges there is a dispute over exactly what happened during the September 10, 2010 incident, it is undisputed that investigation report provided information to Young and Williams' management that supported a decision to impose a written reprimand.

²¹ This investigation appears as a proposed amendment to the complaint, seeking to add a claim that Young was retaliated against for filing this lawsuit. See CP 72.

investigation and again in 2012, after a training exercise. CP 743; 753-755. Thus, the majority of complaints about Young were initiated by complainants other than Williams.

And Young agrees that the subject matter of the investigations were appropriate.

Q. If somebody in your work place went to Mr. Williams complaining about your attendance, do you think it's inappropriate for him to look into that complaint?

A. No.

Q. If someone in your work place went to Mr. Williams and complained that you treated them improperly in an interaction, as in the case with Ms. Saio, is it improper for him to look into that?

A. No.

CP 476-477

On this record, the court below properly rejected the claim of disparate treatment because Young did not produce evidence of the prima facie elements of his claim and did not show that they County's given reasons were a pretext for discrimination.

D. YOUNG FAILED TO PRODUCE EVIDENCE THAT WILLIAMS OR OTHERS ENGAGED IN ADVERSE ACTION AGAINST YOUNG BECAUSE OF PROTECTED ACTIVITY

In order to show a prima facie case of retaliation, a plaintiff must show: (1) that she engaged in a statutorily protected activity, (2) that the defendant took adverse employment action against her, and (3) that there

is a causal link between the activity and the adverse action. *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002) (affirming summary judgment in favor of employer with respect to plaintiff's retaliation claim). To establish the causal link, a plaintiff must show that retaliation was a substantial factor in the employer's action. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862, 991 P.2d 1182 (2000) (same). Young correctly notes that he must prove that the retaliating party knew about his protected activity to even raise a rebuttable presumption of retaliation. Opening Brief, p. 42-43. As a matter of logic, retaliation cannot be a — substantial factor — or indeed *any* factor — in a decision if the decision maker did not know about the protected activity. *See Wilmot v. Kaiser*, 118 Wn.2d 46, 69, 821 P.2d 18 1991). “Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity”. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982).

An adverse action is a “tangible change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Crownover v. Dept. of Transportation*, 165 Wn.App.131, 148 (2012). The change must be more than a mere inconvenience—it must be

something substantial, such as a reduction in workload or pay. *Campbell v. State*, 129 Wn.App. 10, 22 (2005). Even yelling or *threatening* to fire an employee is not an adverse employment action sufficient to support a claim. *Kirby*, 124 Wn. App. at 465. Retaliation claims are also evaluated under the shifting burden analysis outlined *supra*. *Wilmot*, at 70.

With respect to protected activity, there is no evidence of an internal complaint of discrimination until 2012. Young's own declaration states he does not recall when he first made a complaint of racism. CP 742. Records show that his union did raise this claim in 2012, and that Young just failed to provide any information to HR about his race and retaliation claims. CP 163-164. What happened after the complaint is the opposite of an adverse action. HR and management considered Young's assertion that he also did not receive proper notification during the underlying disciplinary investigation and the proposed suspension was withdrawn. CP 20; 22-27.

There is also evidence that a claim of racism was raised again in 2013, and this time Williams was informed of the charge, so had the requisite knowledge to retaliate against Young, but he was no longer Young's supervisor. CP 229. There is no evidence that Williams was aware of Young's attempt to pursue workers compensation benefits any

time before December of 2012, and no corresponding charge of a sufficiently adverse action after that. All Williams' requests for discipline or investigation preceded his participation as a witness in Youngs workers compensation hearing and knowledge of the workers compensation proceeding. CP 105-106; 120-122; 223-227.

In addition, the actions complained of by Young are not sufficiently adverse to support a claim of retaliation. He was never denied any compensation, either because of discipline, or because of a hiring or promotional decision after a complaint of racism at work. The worst action threatened, was a possible suspension, but that was withdrawn and the threat of that act is insufficient to be an adverse action. *Kirby*, 124 Wn. App. at 465. Young cites to *Boyd v. DSHS*, 187 Wn.App 1, 349 P.3d 864 (2015), which adopts a standard found in federal retaliation claims for determining whether a workplace event is an "adverse action". Relying on *Burlington v. Santa Fe Railroad*, 548 U.S. 53, 68 (2006), *Boyd* also applies an objective standard to determine an adverse action by inquiring whether a reasonable employee would be dissuaded from making a charge of discrimination by the challenged employment action. *Boyd v. DSHS*, at 13. However, even under that analysis, Young's claim still fails.

Young's charge of discrimination arose in 2012, *after* he received

notice of a proposed suspension. CP 295-296; 315-319. Thus, the proposed discipline cannot supply the requisite adverse action. After he raised the racism charge, the suspension was withdrawn and HR attempted to investigate the charge of discrimination, but Young supplied no information on his charge. CP 296-297. According to Young, months later, Williams snatched papers out of his hand in a copy room, so reported the incident to his union. CP 743, 756. Over a month later, Young's lawyer wrote to the County's lawyer, claiming that Williams had invaded Young's personal space and aggravated his disability. CP 324. There is no discussion of retaliation. *Id.* Based on this fact pattern a reasonable worker would know that complaints of discrimination are responded to and that his management considers all the facts before imposing discipline. This is not objectively adverse, even under *Boyd*.

Additionally, the County's actual response to notice of racism was both appropriate and legitimate. The County attempted to investigate. And when there was a complaint the following year, the county did so again, despite the union's position that the attempt to investigate was a waste of time. CP 780-783. Young fails to meet his burden of production to avoid summary judgment on retaliation.

E. YOUNG FAILS TO DEMONSTRATE AN OBJECTIVELY HOSTILE WORK ENVIRONMENT MOTIVATED BY HIS RACE

OR PROTECTED ACTIVITY.

To establish a hostile work environment Young must produce evidence that he experienced “harassment [that] (1) was unwelcome, (2) was because he is a member of a protected class, (3) affected the terms and conditions of [her] employment, and (4) was imputable to [his] employer.” *Davis v. Fred’s Appliance, Inc.*, 171 Wn. App. 348, 359, 287 P.3d 51 (2012). The conduct in question must “create an abusive working environment and alter the conditions of employment.” *Washington v. Boeing Co.*, 105 Wn. App. 1, 10 (2000) ; *Clarke*, 133 Wn. App. 767, 787. Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently severe degree to violate the law. *Davis v. Fred’s Appliance, Inc.*, 171 Wn. App. 348, 361-62 (2012). “The conduct must be both objectively abusive (reasonable person test) and subjectively perceived as abusive by the victim.” *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297, 57 P.3d 280 (2002).

First, as more fully explained in section C, *supra*, Young offered no evidence that any workplace conduct by Williams was because of his race. Other than his “Uncle Tom” theory, Young fails entirely to produce admissible evidence of racial animus. His failure to produce such evidence

is equally fatal to his hostile work environment claim. Even if it weren't, Young produced insufficient evidence of objectively abusive conduct.

The record contains many communications from Williams which are appropriate and professional, when Young is not. See CP 223-224; 230-240; 256-260. Young's contemporaneous complaints show heightened sensitivity to communications that are facially reasonable. For example, Young often complained to his union representative, and asserted on one occasion reported bringing up issues Williams should have been aware of and Williams responded by reviewing the code book, reciting its content and then "punished" Young with emails, other "nonproductive issues" and assignment of "tasks that others should handle". CP 833-852. Young says this establishes Williams' intent "to make my job a HORROR FILM a B-HORROR FILM at that on a daily basis". CP 846. When Williams sent a fairly innocuous notice that "initially Aaron will carry out the contacts and coordination but later you both will have that opportunity", Young told his union Williams was "trying to relegate me to file maintenance issues". CP 845. In response to an email regarding an assignment for Halley, Young complained "Here is another slam by my supervisor...statements below which are directed at me are false and incorrect", even though the email complained of does not

mention Young and he is not a recipient. CP 833-835.

Perfectly reasonable requests by Williams, were met with argument and sarcasm. When Williams reminded Young to limit personal calls at work, Young said “if you were hanging on my every word you would know it wasn’t just about a seat.....If I tracked everyone’s conversations/whereabouts all day I don’t think I would be able to get anything accomplished myself” and “I appreciate the reminder and totally understand. Thanks multi-tasker”. CP 230-240. When Williams requested a workload status update, Young was just plain uncooperative: “The information you are requesting has been provided on numerous occasions please review your notes from our meetings and e-mails regarding the information you are seeking”. CP 239. Williams had to remind Young not to call his peers names, yell, and walk out of meetings before they were over. CP 233-234. Young often disagreed with Williams, but his remarks do not refer to racial bias or protected activity.

The theme that emerges when reading Young’s cotemporaneous emails is that he did not like being supervised, because he felt he knew more than his supervisor. His remarks to both HR and his manager were similar: he felt Williams made mistakes and did not know the permitting process as well as he should. CP 106; 174. These kinds of complaints to

management and HR did not put them on notice of racial bias or retaliation—it notified them that Young and Williams had a contentious working relationship. Also, contrary to Young’s brief, there is no evidence of internal complaints, known to Williams that would provide the requisite knowledge necessary to form a retaliatory intent to harass.²²

Even looking at the totality of the evidence as presented by Young, it is simply not sufficient to have altered his workplace. Young complains that he was subjected to investigations, but they were on on subject matter that he agrees is appropriate for investigation and most of them were initiated not by Williams, but peers of Young or Young himself. CP 476-77; 283;298-99; 337-338; 340-341; 136-161. He also contends that some of his duties were changed for a period of time, his supervisor impeded (but did not prevent) him from leaving his cubicle on one occasion when Young felt claustrophobic and on one other occasion snatch papers out of his hand at the copier. CP 737; 743. Such acts, assumed for the purpose of this discussion, are childish and certainly annoying, but the WLAD is not

²² “Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity”. *Cohen v. Fred Meyer*, 686 F.2d 793, 796 (9th Cir. 1982); *Wilmot v. Kaiser*, 118 Wn.2d 46, 69, 821 P.2d 18 1991).

a civility code²³. But a civil rights code is not a “general civility code.”

Adams v. Able Bldg. Supply, Inc., 114 Wn. App. 291, 297, 57 P.3d

280,284 (2002).²⁴ The acts complained of are legally insufficient to establish a hostile work environment.

F. APPELLANT’S NEGLIGENCE CLAIM FOR MENTAL INJURY ARISING FROM A WORKPLACE INCIDENT IS BARRED BY THE INDUSTRIAL INSURANCE ACT AND BECAUSE HE FAILS TO ESTABLISH A DUTY OWED BY THE COUNTY

Washington's Industrial Insurance Act provides the exclusive remedy for all on-the-job injuries and occupational diseases covered by the Act. RCW 51.04.010. The legislature has provided a speedy, no-fault, remedy for employees injured in the workplace:

The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

²³ Young may not rely on the 2010 “assault” to support this claim of hostile work environment as it is a discrete act that gives rise to a claim of disparate treatment when it occurs *Antonius v. King County*, 153 Wn.2d 256, 270, 103 P.3d 729, 737 (2004). Hostile work environment claims are based on the cumulative effect of actions that are not actionable on their own. *Id.*

²⁴ citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998).

RCW 51.04.010.

Thus, the IIA precludes Young from litigating his negligent infliction of emotional distress in superior court if that claim arises from an “injury” or “occupational disease” that is compensable under the Act. See *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wash.App. 552, 829 P.2d 196, 203–04 (1992), rev'd. on other grounds, 124 Wn.2d 634 (1994).

The Act defines “injury” as “a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result.” RCW 51.08.100. RCW 51.08.100 requires a relation between the injury and “some identifiable happening, event, cause or occurrence capable of being fixed at some point in time and connected with the employment.” *Spino v. Dep't of Labor & Indus.*, 1 Wn.App. 730, 733 (1969). “The key is ‘in the establishment of causation, the connection between the physical [or mental] condition, and employment.’” *Rothwell v. Nine Mile Falls Sch. Dist.*, 173 Wn. App. 812, 819 (2013) citing *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn.App. 335, 342, 725 P.2d 463 (1986). A mental condition caused by stress can qualify as an industrial injury if the condition resulted from a sudden, tangible, and traumatic event that produced an immediate result. *Rothwell v. Nine Mile Falls Sch. Dist.*, 173 Wn. App. 819-20. This includes a diagnosis of PTSD, arising

resulting from a workplace event. *Rothwell*, at 822.

Under the IIA, a worker may apply to the Department of Labor and Industries to re-open an earlier workers' compensation claim due to aggravation of an industrial injury, if application is presented within 7 years of the date the first order closing the claim becomes final. RCW 51.32.160. This process allows for employees to present information that a condition arising from an industrial injury has worsened. To prevail on an aggravation claim, a claimant must prove through medical evidence that the industrial injury caused the aggravation. *Phillips v. Department of Labor & Indus.*, 49 Wn.2d 195, 197 (1956). "Medical evidence based at least in part on objective symptoms must show that an aggravation of the industrial injury resulted in increased disability." *Lewis v. ITT Continental Baking Co.*, 93 Wn.2d 1, 3 (1979).

To prevail on his negligent infliction of emotional distress claim Young must show (1) that his employer's negligent acts injured him, (2) the acts were not a workplace dispute or employee discipline, (3) the injury is not covered by the Industrial Insurance Act, and (4) the dominant feature of the negligence claim was the emotional injury. *Chea v. Men's Wearhouse*, 85 Wn.App. 405, 412-13, 932 P.2d 1261 (1997), review denied, 134 Wn.2d 1002, 953 P.2d 96 (1998). As with any

negligence claim Young must establish duty, breach, proximate cause, and damage or injury. *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). Negligent infliction of emotional distress claims have a limited place in the employment context. “[A]bsent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes.” *Snyder*, 145 Wn.2d at 244, 35 P.3d 1158. Young’s negligence claim is barred by the IIA or it is based on conduct excluded under the foregoing authority.

The diagnostic criterion applied by Young’s own therapist, includes a requirement that PTSD be triggered by a qualifying event that involves actual or threatened serious injury, or a threat to the physical integrity of self. The diagnostic manual containing the criterion for PTSD includes a triggering event from exposure to “a traumatic event in which both of the following were present:

- (1) The person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.
- (2) The person’s response involved intense fear, helplessness, or horror. Note: In children, this may be expressed instead by disorganized or agitated behavior”.

American Psychiatric Association. 309.81²⁵ Posttraumatic Stress Disorder. In: American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders*. 4th ed. 424-429. American Psychiatric Association 1994 (1952).

Young described a traumatic event to his therapist during his 2012 assessment: he described an “assault” at work *and* mental health concerns dating back to this “assault”. CP 951; 953; 962. As Young describes this “assault”, it was a sudden event that produced panic attacks and anxiety, according to Young’s attorney. CP 936-938.

Since Young’s mental health condition was caused by the traumatic “assault”, at work, his injury is covered under the IIA. All he needs to do is present evidence of this connection when he re-opens his 2010 physical injury claim. Young argues that another trigger of his mental injury was a co-worker, who “takes notes on his actions at work and forwards them to a supervisor”. CP 962. He also claims that two workplace conflicts that he characterizes as “aggressive” are something other than a workplace disputes. Opening Brief, at 56-57. But this is precisely what *Snyder* excludes from NIED claims.

The first instance is an outburst during a training exercise, when Young became frustrated and abruptly left, resulting in an argument

²⁵ Young’s therapist refers to the DSM numeric code 309.81 in her PTSD diagnosis. CP 963. The DSM IV was the most current version of the manual at the date of Young’s

between them. CP 303-305. The second instance is a disagreement at the copier over which pages belonged to whom, allegedly resulting in Williams snatching papers from Young. CP 755. Management's response or "ratification" of Halley's surveillance is also a response to a workplace dispute, even if Young does find it stressful. Employees are not entitled to a stress-free workplace. *Snyder*, at 243; *Bishop v. State*, 77 Wn. App. 228, 234-35 (1995). There is no duty owed to Mr. Young to prevent emotional distress when a peer takes notes and complains about him; when his supervisor argues with him about his workplace conduct, or even when he snatches papers from Young in a copy room dispute.

Lastly, Young must demonstrate that his negligent infliction claim is based on facts other than those used to support his discrimination claims. *Johnson v. Department of Social & Health Servs.*, 80 Wash.App. 212, 230-31 (1996); *Musselman v. Nitchman*, 2005 WL 1657077, 7 (W.D. Wash. 2005) (dismissing negligent infliction of emotional distress claim on summary judgment for failure to plead a separate factual basis from his retaliation claim). Young's amended complaint makes clear that he relies on the same factual allegations to support his negligent infliction claim that also support his discrimination theories. CP 31-41. Paragraphs

diagnosis in 2012. The DSM V was published in 2013.

5.3, addressing racial discrimination, and 8.3, addressing negligent infliction of emotional distress, both rely on Halley's surveillance of Young as the basis for the claim. This further supports the court's dismissal, even if it is not the reason for the trial court's dismissal.

V. CONCLUSION

Based on the foregoing argument and authority, the County respectfully requests that this court affirm the trial court in all respects.

DATED this 1st day of February, 2016.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: */s/ Erin Overbey*
ERIN OVERBEY, WSBA # 21907
Senior Deputy Prosecuting Attorney
Attorneys for Appellee
500 Fourth Avenue, 9th Floor
Seattle, WA 98104
Telephone: 206-477-9439

CERTIFICATE OF FILING & SERVICE

I hereby certify that on the 1st day of February, 2016, I filed the foregoing document with the Court of Appeals, Division I and further certify that I served a copy of the same via ABC Legal on the following:

**Patricia S. Rose, WSBA 19046
Law Office of Patricia S. Rose
100 West Harrison Street
South Tower, Suite 460
Seattle, WA 98119**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of February, 2016.

/s/ Linda Khampradith
LINDA KHAMPRADITH
Legal Secretary
King County Prosecuting Attorney's Office

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