

No. 44885-8-II

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

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COURT OF APPEALS
DIVISION II
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ELIZABETH DAVIS,

Appellant,

v.

STATE OF WASHINGTON; WASHINGTON STATE PATROL,

Respondents.

Appellants' Opening Brief

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I. INTRODUCTION

This is yet another case where a Trial Court overstepped its bounds by dismissing a meritorious discrimination case brought pursuant to RCW 49.60.01, despite the fact that the Appellate Courts for this State have repeatedly commanded that such cases generally are not susceptible to summary resolution and almost always involve questions of fact for a jury to decide. This case is not complex.

Appellant, (Plaintiff hereafter), Elizabeth Davis was the only African-American female in her cadet class with the Washington State Patrol (WSP) and after she complained about racial and sexual discrimination, and despite the fact that she was one of the best candidates in the class, based on objective standards, and despite the fact she routinely outperformed others, was nevertheless not hired/terminated from her position.

As the evidence presented below suggested, WSP could not terminate Elizabeth Davis based on objective criteria such as written testing because her scores were consistently excellent, so instead, WSP wrongly terminated (failure to hire her) based on subjective opinion-based standards related to her performance in a few scenario-based exercises. Although Caucasians, and especially Caucasian men, were given more

chances to pass the subjective portion of these exercises, WSP passed those who they wanted to pass, predominantly Caucasian males and Caucasian females who performed worse than the Plaintiff.

WSP, with respect to this cadet class, terminated the only African-American woman who passed every physical and written test with "flying colors." Caucasians who failed exercises were routinely given multiple chances to pass tests, while this African-American female Plaintiff was not. Additionally, such events were occurring with the backdrop of a work environment where racial and sexist remarks were routine. Demeaning comments were made by supervisory personnel to Plaintiff, such as "Was it as good for you as it was for me?" (CP 98)

This is a case which clearly should have played out before a jury and it was error for the Trial Court to dismiss it based on summary judgment standards. It respectfully suggests that had summary judgment standards been appropriately applied to the facts of this case, it never would have been dismissed.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred by misapplying the summary judgment standards applicable to employment discrimination cases.

2. The Trial Court erred by dismissing Plaintiff's race and gender, disparate treatment, and discrimination claims, when, at a

minimum, there were unresolved questions of fact as to whether or not Plaintiff's race and/or gender played a role in the adverse employment decisions which were taken against her, which included a failure to hire her (termination) as a member of the WSP.

3. The Trial Court erred by dismissing Plaintiff's claim for reprisal for opposing discriminatory practices, which is protected on the terms of RCW 49.60.210, when, based on the record which was before it, there was at a minimum a question of fact as to whether or not a retaliatory animus was a substantial factor in the adverse employment actions taken against this Plaintiff.

4. The Trial Court erred by dismissing Plaintiff's claims that she was a victim of a gender/racially-hostile work environment when, throughout her tenure at the WSP training academy, she was subject to disparate treatment designed to set her up for failure, and was subject to words and/or conduct indicative of gender and racial-based stereotyping, including the usage of a number of derogatory statements and/or comments directed towards her as a female.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court misapply the rules of summary judgment, when it dismissed on summary judgment grounds Plaintiff's claims for disparate treatment, retaliation, and hostile work environment,

which were brought under the provisions of Washington's Law Against Discrimination (WLAD), RCW 49.60.01-04.

IV. STATEMENT OF FACTS

A. Factual Background

Plaintiff Elizabeth Davis (then Elizabeth Griffin) started with WSP as a Communications Officer Assistant on July 16, 2007. (CP 173) Plaintiff was accepted into the WSP Trooper Cadet on June 30, 2008, and transferred from her previous position of communication officer assistant to that of a trooper cadet. (CP 114;168)

Elizabeth Davis' selection review was judged to meet all standards and she was commended on many qualities, including her judgment, ability to adapt, integrity and motivation. (CP 181-182) Prior to starting as a WSP cadet, on October 16, 2009, Plaintiff was informed that she would be judged on her overall performance in field assignments, performance during arming training, GP, physical fitness, training rides, written tests and oral boards and not just on any one criteria. (CP 176-179) Plaintiff passed and exceeded all of her Physical training requirements on November 30, 2008, December 31, 2008, January, 31, 2009, February 28, 2009, March, 31, 2009, April 30, 2009, May 31, 2009, June 30, 2009, July 27, 2009, August, 29, 2009, September 27, 2009. (CP 201-259; 290-295) Plaintiff successfully completed training

on crowd control, emergency preparedness, passenger vessel and terminals, hazardous materials incident response for terrorist bombings. (CP 262-64; 297-298)

Plaintiff's weekly and 3-month performance reviews always scored to be acceptable, at the very least, in the categories of 'Appearance and care of equipment, Academics, Practical's (driving, defensive tactics, firearms, etc.) and Performance.

Plaintiff's Job Performance Appraisals signed in September 2008, October 17, 29, 2008, November 3, 4, 7, 2008, December 18, 2008, March 2009, June 2009 and September 2009, judge Plaintiff as satisfactory to outstanding. (CP 147-165; 277-294) Ms. Davis received various commendations and positive job comments for her work in September 24, 2008, October 8, 2008, November 2008, January 5, 2009, January 30, 2009, May 5, 2009 and September 2, 2009, September 24, 2009. (CP 184-200) She was repeatedly praised because she "continues to go above and beyond..." (CP 148).

Plaintiff was judged to be acceptable to superior in all categories on January 9, 25 & 26, 2009, March 6 & 20, 2009 April 2, 17 & 24, 2009, May 6, 2009, June 19 & 26, 2009, July 8 & 17, 2009, August 7, 2009, September 12, 2009, October 29, 2009 and Plaintiff was repeatedly told she was doing "great work." (CP 116-142; 203-209). Plaintiff was

judged to be acceptable to superior in these categories and commended for excellent work on November 17 and 19, 2009. (*Id.*; CP 272-274). Plaintiff's performance in these critical areas was judge to be acceptable, including a commendation related to Plaintiff's physical fitness on December 3, 2009. (CP 116-142). On January 15, 2010, Plaintiff's performance was judge even higher in all categories and leaned towards the superior ranking; she was judged to be outstanding during the boxing exercise for her aggressiveness and her grade point average in trooper Basic training was commended for being 95.72%, ranking 2nd out of 25 candidates. (*Id.*) On January 20, 2010, Plaintiff's performance was again acceptable to superior in all categories. (*Id.*) On January 27, 2010, Plaintiff was determined to be acceptable to superior in all areas and was commended for her performance in practical exercises, including firearms, driving and exhibited "great work" during the riot control practical exercise and was repeatedly referred to as excellent in many other categories. (*Id.*)

On February 24, 2010, Plaintiff was judged to be acceptable and her academic credentials were the 2nd in the class and she was commended for her work in a Commercial Motor vehicle Practical Exercise and was only criticized in one area dealing with during a driving exercise. (*Id.*) Dec. of TPM. She was again stated to be doing an

outstanding job and her “enforcement decisions were reasonable.” In a rare occurrence, the Plaintiff was criticized in her weekly performance reviews was March 16, 2010, during a week that WSP acknowledges that she was clearly physically sick and in fact stated that she was “very sick and had not slept” and yet she was still criticized harshly on subjective standards, although she was noted to be excellent on areas that are judge objectively (I.e. she was less than one percent away from the highest rank academically). (*Id.*) On March 16, 2010, Plaintiff was harshly criticized in a building search exercise for visibly shivering from being cold, even though the temperature in the building was “normal.” But Defendants do not recognize that Plaintiff was physically sick. (*Id.*; CP 264).

On March 22, 2010, Plaintiff’s performance was back to acceptable and she had passed the re-test on driving and was commended for an “outstanding job” in that regard, as well as receiving a 100% perfect score on two written exams. (*Id.*) On March 30, 2010, Defendants failed the Plaintiff in a high-risk vehicle stop exercise, completely based on opinion, subjective criteria that the Plaintiff disagrees with. (CP 268).

In her daily Cadet Report on March 31, 2010, Plaintiff reported that she was not feeling well and had an elevated temperature (CP 272). On this same day, March 31, 2013, Plaintiff was subjectively failed by

Captain Spurling and again failed at the retest a week later on April 7, 2010. (CP 335-336). The subjective criteria that were expressed to fail the Plaintiff on this one test are in direct contrast to the observations on the objective testing. (CP 336). The scoring Plaintiff received on this one test and re-test is inconsistent with how she was scored on the same criteria in other exercises, including the two vehicle collision, high risk vehicle stop exercise, night pursuit exercise etc. Plaintiff passed most of the exercises the first time without issue. (CP 338-363). Plaintiff also passed the defensive tactics proficiency evaluation with no problems. (CP 365-367). She passed the Driving skills test. (CP 369-376).

The section of the policy that addresses how these exercises demonstrates that the numerical system of grading field exercises is more objective because it has a numerical scoring system, rather than a pass/fail criterion. (CP 386). An example is Plaintiff's score on the one car mock collision exercise. (CP 389-391). More important, there is nothing in this section of the procedure/Rule book that states that failure and failure of the retest required termination (CP 389-390).

Plaintiff was terminated on April 8, 2010, without any rights to appeal or grievance. (CP 144-145). This is despite the fact that Plaintiff was informed she would be judged by her overall performance and her performance on all the objective tests (over 40 objective tests) plaintiff

regularly scored 100% and had the second highest average of scores out of 25 cadets. (CP 302). Plaintiff's peer reviews by fellow cadets were also predominately very positive; even an independent investigation proved that WSP's stated and pretext reasons for terminating plaintiff did not make sense because she was a top performer. (CP 305-329; 392-394). Out of the 25 cadets, Plaintiff was the only one terminated. (CP 331).

In this matter, one simply needs to review plaintiff's academy records in order to have doubts about what transpired. From all appearances, plaintiff was doing great at the Academy. Mysteriously and without a persuasive explanation, she was so bad she was unworthy of a job. It's suggested, that alone, establishes a question of fact regarding "pretext".

B. Procedural History

This case was filed on May 8, 2012. (CP 1-5). Within the complaint, Plaintiff brought claims against the State of Washington/Washington State Patrol for, among other things, discrimination based on race and gender in violation of RCW 49.60.01, hostile work environment and unlawful retaliation.

On June 11, 2012, Defendant answered, denying Plaintiff's claims and asserting a variety of affirmative defenses. (CP 6-10).

On March 8, 2013, Defendant moved for summary judgment. Defendant's motion was supported by a number of declarations. (CP 11-30).

On April 9, 2013, Plaintiff provided a detailed response supported by her own declaration and declaration of counsel with a number of supporting documents. (CP 108-420). Within her declaration, Plaintiff Elizabeth Davis (formerly Griffin), explained that she commenced her training as trooper cadet for the WSP in October 2009 as part of the 97th Trooper Basic Training Class. (CP 91-107) (Appendix No. 1). She also indicated that throughout her training she was never informed that she was having any performance problems until the last week of her training. She was at the top of her class academically, and excelled in driving and shooting and passed all objectively-measured written and practical exams. All of her weekly evaluations were positive as well. All the verbal feedback she was provided by her trainers was generally positive. (CP 92-93).

Plaintiff explained that she was successfully performing, based on all objective standards that she was provided despite the fact that her performance on occasion was hindered by the fact she was given ill-fitted

equipment, including an oversized helmet which impaired her ability to hear and see. Based on Plaintiff's observation no other cadets were provided such improperly-fitted equipment. (CP 92).

Plaintiff also provided factual observations with respect to the poor performance of other cadets, who nevertheless were not terminated and were passed on to become members of the Washington State Patrol. Plaintiff also explained how other non-African-American females were provided preferential treatment where their errors were simply ignored. (CP 93).

She also testified that her training was punctuated by sexual and racist comments that should have raised questions with respect to the fairness of the evaluative processes used in evaluating Plaintiff's performance as a cadet. For example, she was told that sounded like a "flight attendant," an obvious example of gender stereotype. (CP 95: 97-101). She also had to suffer the derogatory and derisive comments from her fellow cadets that the only reason she was chosen to go through basic training was because she was a Black female and because the WSP needed diversity. Others joked about how all the dark-skinned cadets were assigned to sit at the same table. When Plaintiff complained about such conduct, nothing was done. (CP 100).

Additionally in her declaration, Plaintiff factually disputed a number of the justifications for her failure at the academy. For example, one of the criticisms was that she did not review a videotaping of an exercise. However, as Plaintiff pointed out, the video recording failed; thus, there was simply no recording for her to review. (CP 96).

On April 15, 2013, Defendant replied once again attempting to justify its actions toward the Plaintiff. (CP 423-439).

On April 19, 2013, Defendant's Motion for Summary Judgment was heard before the Honorable Susan Serko. (RP 4/19/13 at 1-22). After oral argument, Judge Serko granted Defendant's Motion for Summary Judgment with respect to all of Plaintiff's claims and dismissed Plaintiff's case with prejudice. In her oral ruling, Judge Serko opined that the plaintiff had failed to prove "pretext" (RP 4/19/13 at 22) (CP 444-445).

This appeal timely followed. (CP 446-450).

V. ARGUMENT

A. Rules Applicable to Motion for Summary Judgment and Discrimination Cases.

Appellate courts review a Trial Court's grant of summary judgment *de novo*, *Briggs v. Nova Services*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009).

When considering a motion for summary judgment, all facts must be considered in a light most favorable to non-moving party and all facts submitted and all readable inferences should be construed in such manner. See *Rice v. Offshore Systems, Inc.* 167 Wn. App. 77, 88, 272 P.3d 865 (2012), citing two *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991, P.2d 675 (2010). Summary judgment should rarely be granted in employment discrimination cases. *Id.* In order to overcome a motion for summary judgment in discrimination case there is no requirement that the aggrieved employee produced “smoking gun evidence of a discriminatory and/or a retaliatory intent. See *Rice v. Offshore Systems, Inc.* 167 Wn App. at 89; *Selstead v. Washington Mutual Savings Bank* 69 Wn. App. 852, 860, 851 P.2d 716 (1993). Circumstantial, indirect and inferential evidence is sufficient to overcome an employer’s motion for summary judgment in a discrimination case. *Id.*

The reason why summary judgment is disfavored in employment discrimination cases is because “the decision as to the employer’s true motivation plainly is one reserved to the trier fact.” See *Lowe v. City of Monrovia* 775 F.2d 998, 9008 – 09 (No. 9th Cir. 1985) citing to *Peacock v. Duval* 694 F.2d 664, 646 (9th Cir. 1982). It is well established that the “employer’s intent to discriminate is a ““a pure question of fact to be left to the trier fact...” *Id.* An employer’s true motivation in an employment

decision is rarely easy to discern and “without a search inquiry into these motives, those acting for impermissible motives could easily mask their behavior behind a complex web of *post hoc* rationalizations.” *Id.*¹ Because RCW 49.60.020 commands “liberal construction” needed statutory purposes summary judgment is rarely appropriate in WLAD cases when the evidence contains reasonable but competing inference of both discrimination and nondiscrimination that must otherwise be resolved by the jury. See *Frisino v. Seattle School District No. 1* 160 Wn. App. 765, 777, 249 P.3d 1044 (2011); see also *Martini v. Boeing Co.*, 137 Wn.2d. 357, 364, 971 P.2d 45 (1999); *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 456, 166, P.3d 807 (2007).

Because of the lofty statutory purposes of RCW 49.60 et. seq. set forth within RCW 49.60.010 and the command of liberal construction set forth within RCW 49.60.020 the elements of a discrimination claim under the WLAD are straightforward, simple and relatively easy to prove. The elements of a disparate treatment claim under the WLAD are set forth within WPI which provides 330.01 which provide under the heading of

¹As Washington’s law against discrimination (WLAD) has a specific provision demanding liberal construction similar federal law is only persuasive. See RCW 49.60.020. This is because the statutory mandate of liberal construction requires that the courts view with caution any construction which would narrow the coverage of the law and which would undermine its statutory purposes of deterring and eradicating discrimination in Washington – a public policy of the highest priority. See *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 292 P.3d 779 (2013). (Rejecting the federally recognized “same act or inference” as being inconsistent with the WLAD.”

“employment discrimination – disparate treatment – burden of proof” the following:

Discrimination employment on the basis of race and gender is prohibited. To establish her disparate treatment claim, plaintiff has the burden of proving each of the following propositions. (1) That the State of Washington (WSP) terminated/did not hire plaintiff; and (2) that plaintiff’s race and/or gender was a substantial factor in the State of Washington’s (WSP) decision to terminate/not to hire plaintiff ...(bracketed materials excluded; blanks filled in).

The ultimate burden of proof in a disparate treatment claim is not particularly onerous nor can it be given the commands of the statute. A “substantial factor” as utilized within WPI 330.01 is defined in WPI 330.01.01 in the following terms:

“Substantial factor” means a significant motivating factor in bringing about the employer’s decision. Substantial factor does not mean the only factor or the main factor in the challenged factor decision. Substantial factor also does not mean that plaintiff would not have been hired/and/or not terminated but for her race and/or gender. (Bracketed material added.)

The substantial factor test was first adopted in the case of *Mackay v. Acorn Custom Cabinetry, Inc.* 127 Wn.2d 302, 898 P.2d 284 (1985). As explained in Justice Madsen’s dissent in the *Mackay* case under this standard an employee can prevail on a disparate treatment claim under the

terms of the WLAD even if there were otherwise legitimate reasons supportive of the adverse employment decision:

As I understand the majority opinion, this full panoply of relief is available if the plaintiff proves that the discriminatory reason was a substantial factor in the employment decision. Substantial factor is a standard which permits a trier fact to find liability even if the employee would have been fired in any event for legitimate reasons. (*Mackay* 127 Wn.2d at 315.)

Thus, when considering a motion for summary judgment the court always must be mindful as to whether or not the evidence creates a reasonable inference that a discriminatory or retaliatory motive was a substantial factor in the discharged decision, regardless of what methodology of proof is being utilized by the aggrieved employee. See *Rice v. Offshore Systems, Inc.* 167 Wn. App. at 89.

Under a substantial factor test there is simply no requirement that the employee disproved the employer's proffered reasons for the adverse action. Under a "substantial factor test" the employee can still prevail when the evidence presented proves that a "substantial factor in an employment decision is an illegal motive, even if there are otherwise valid justifications for the adverse decision

It is noted that it has been found to reversible error for a trial court to instruct a jury on anything but the above-referenced basic elements of a disparate treatment case. See *Johnson v. Chevron U.S.A., Inc.* 159 Wn. App. 18, 32-3, 244 P.3d 438 (2010) (reversible error to instruct jury that in order to prove race discrimination claim that the employee had to prove that he was “treated differently” from coworkers who were not disabled or not African American).

While it is true that disparity and treatment between those within or without a protected class are relevant in admissible evidence such evidence is not required. *Id.* See, for example, *Johnson v. DSHS* 80 Wn. App. 212, 226 – 27, 907 P.2d 1223 (1996).

Thus in the context of “disparate treatment” all that is required of plaintiff is to create a question of fact as to whether or not the employer treated some people less favorably than others because of either their race and/or gender. Under *Johnson* a *prima facie* case of disparate treatment is established by showing;

- (1) She belongs to a protected class;
- (2) She was treated less favorably in the terms and conditions of her employment;
- (3) Then a similarly situated, non-protected employee, and

- (4) She and the non-protected “comparator” were doing the substantially the same work...

Alternatively, an employee can overcome summary judgment by presenting any evidence which suggests that there was an illegal motivation behind the adverse employment decision. See *Warren v. City of Carlsbad* 58 F.3d 439 (9th Cir. 1995) (derogatory comments indicating a stereotypical view based on race or gender grounds is sufficient to create an inference of discriminatory motive, as does the fact that the employer utilized a “subjective criteria” in the decision-making process as noted in *Warren*, the use of “subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized.”). *Id* at 443, citing to *Jauregui v. City of Glendale* 852 F.2d 1128, 1136 (9th Cir. 1988). See also *Mackay, supra*, (derogatory comments regarding gender relevant in establishing disparate treatment case) see also *Bennett v. Hardy* 113 Wn.2d 912, 74 P.2d 1258 (derogatory comments regarding protective characteristic evidence of disparate treatment).

Further, the fact that there were negative and derogatory comments made in the work environment are relevant to establish the existence of a “corporate state of mind.” See *Conway v. Electro Switch Corp.* 825 F.2d 593, 597, (1st Cir. 1987). As discussed in *Conway* evidence of discriminatory comments in the work environment provided as compared

to her peers none of whom were African American and clearly none of which were African American females. Plaintiff was treated differently. She was successful on all tasks that were graded based on objective criteria. She only failed on those issues which were based on subjective criteria which, are inherently suspect not only because of their subjective nature but how they were applied to her. Her peers were given opportunity after opportunity or had their shortcomings overlooked. A marked contrast plaintiff's performance was subject to strict scrutiny. (Disparate scrutiny can be indicia of an improper motive. See *Eldaghar v. City of New York* WL 2971467 (S.D.N.Y. 2008) citing to *Cross v. N.Y. City Transit Authority* 417 F.3d 241, 250 (2d Cir. 2005). According to plaintiff the standards that were applied to her were much more exacting than those applied to her male and/or not African American counterparts (CP 93). Here, the "corporate environment" was sprinkled with derogatory racial comments that simply cannot be ignored.

Although plaintiff has no obligation to prove "pretext", pretext can be proven by a number of methodologies including a showing that (1) the employer's reasons have no basis in facts; or (2) even if the employer's reasons are based on fact, the employer was not motivated by those reasons; or (3) the reasons are insufficient to motivate the adverse employment decision. See *Kuyper v. State* 79 Wn. App. 732, 738 – 39,

904 P.2d 793 (1995); *Chen v. State* 86 Wn. App. 183, 190, 937 P.2d 612 (1997).

Beyond plaintiff's cogent evidence of disparate treatment compared to her non-female and non-African American peers the evidence also suggests that the proffered reasons for the defendant to hire her/or termination were pretextual. Initially it is noted that she was set up to fail by giving ill-fitted equipment. Additionally those involved in her training indicated that they did not believe that females should be part of the WSP "if I was his wife or daughter, he would not want me to be a trooper." (Dec of plaintiff Page 5). Also no matter what plaintiff apparently would do she could "not get it right." At one point the plaintiff was criticized for not being aggressive and then when she acted aggressively she was criticized for being "too aggressive." She is criticized for not reviewing a videotape of her performance, when in fact the videotaping was not working with respect to the exercise which she performed.

Although others were given regular counseling for their poor performance plaintiff's performance was not subject to significant criticism and she was abruptly terminated based on a subjective determination that she failed a test. Otherwise based all objective indicators of performance were favorable to the plaintiff.

It is safe to say, that plaintiff's declaration alone creates questions of fact as to whether or not "a substantial factor" in the decision to terminate/not to hire her were her protected characteristics of being an African American female.

B. Plaintiff Questions of Fact with Respect to Plaintiff's Retaliation Claim Pursuant to RCW 49.60.210.

Plaintiff's retaliation claim is based on RCW 49.60.210. The elements of such a claim are set forth within WPI 330.05 which under the heading of "employment discrimination – retaliation" provides:

It is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be discrimination on the basis of race and/or gender and/or providing information to or participating in a proceeding determine whether or not discrimination or retaliation occurred.

To establish a claim of unlawful retaliation by the State of Washington (WSP) the plaintiff has the burden of proving each of the following propositions:

- (1) That plaintiff was opposing what she reasonably believed to be discrimination on the basis of race and/or gender or was providing information to, and/or participating in a proceeding to determine whether discrimination or retaliation has occurred; and

- (2) That a substantial factor in the decision to terminate was the plaintiff's opposition to what she reasonably believed to be discrimination or retaliation and/or providing information to and/or participating in a proceeding to determine whether discrimination or retaliation has occurred.

It is undisputed that at least twice prior to plaintiff being abruptly dismissed from the WSPA training course she had complained about discriminatory conduct being perpetrated by her peers. Not only was the plaintiff the victim of gender discriminatory remarks but also had to put up with racist remarks which she complained about to her supervisor Corporal Laur. (CP 100). Contrary to the state's assertion, according to the plaintiff such racist comments continued on despite her complaints.²

For the same reasons that a jury could reasonably conclude that the plaintiff was a victim of discrimination because of race and/or gender they could also conclude that she was a victim of unlawful reprisal. As

²As indicated in plaintiff's declaration, as early as October 2007, she had filed a harassment complaint with the WSP regarding racial remarks within the workplace. (CP 91). According to plaintiff this complaint was never resolved. The fact that such complaint was never resolved and/or effectively addressed, is of course relevant because it is indicative of the WSP's indifference to such concerns, and is of course relevant to the existence of an environment where not only discrimination but reprisals for complaints regarding such discriminations that occurred. Additionally the ineffectiveness of the employer's response is relevant to the issue as to whether or not a "hostile work environment" created by coworkers should otherwise be imputed to the employer. See *Francom v. Costco* 98 Wn. App. 845, 856, 991 P.2d 1182 (2000) (failure to take reasonably prompt and adequate corrective action is relevant as to whether or not harassment should be imputed to employer"; see also *Perry v. Costco* 123 Wn. App. 783, 98 P.3d 1264 (2004).

discussed in *Hollenvack v. Chriners Hospital for Children* 149 Wn. App. 810, 823, 206 P.3d 337 (2009).

Because employers rarely will reveal that they motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose. The plaintiff need not show that retaliation was the only or “but for” cause of the adverse employment action, but he or she must establish that it was at least a substantial factor. One factor supporting a retaliatory motive is in close proximity in time between the protected activity and the employer’s actions. (Citations omitted); see also *Renz v. Spokane Eye Clinic* 114 Wn. App. 611, 618, 16 P.3d 106 (2002); *Delahunty v. Cahoon* 66 Wn. App. 829, 839 – 41, 832 P.2d 1378 (1992).

Here, plaintiff’s complaints to her supervisor regarding racial comments clearly would be protected opposition activity under the terms of RCW 49.60.210. There is simply no question that recording of potentially racially hostile work environment is statutorily protected activity. See *Davis v. West One Automotive Group* 140 Wn. App. 449, 166, P.3d 807 (2007). All that is necessary is that the employee “reasonably believes” that the conduct of which they are complaining about is discriminatory in order to file under the protections of the “opposition clause” of RCW 49.60210. *Renz v. Spokane Eye Clinic* PS

114 Wn. App. 611, 63 P.3d 106 (2002). It was only after such opposition occurred (shortly thereafter) that plaintiff's position at the WSP was abruptly terminated. That is more than sufficient to overcome defendant's summary judgment on this particular claim.

C. There Are Genuine Issues of Material Facts as to Whether or Not Plaintiff was a Victim of a Gender and/or Racially Hostile Work Environment.

The elements of plaintiff's hostile work environment claim are set forth in WPI 330.23 which under the heading of "workplace harassment – hostile work environment – burden of proof" provides the following.

To establish her claim of harassment on the basis of race and/or gender plaintiff has the burden of proof to each of the follow propositions;

- (1) That there was language or conduct concerning race and/or gender;
- (2) That this language or conduct was unwelcome in the sense that plaintiff regarded the conduct as undesirable and offensive and did not solicit or incite it;
- (3) That this conduct or language was so offensive or pervasive as to alter the terms and condition of plaintiff's employment and
- (4) Either:
 - (a) The owner, manager, partner or corporate officer of the State of Washington (WSP) participated in the conduct or language; or

- (b) That management knew, through complaints or other circumstances, of this conduct or language, and the State of Washington (WSP) failed to take reasonably prompt and adequate correct action reasonably designed to end it; or
- (c) That management should have known of this harassment because it was so pervasive or through other circumstances; and the State of Washington (WSP) failed to take reasonably prompt and adequate corrective action reasonably designed to end it... (Brackets filled in).

WPI 330.24 further defines who is or is not a “manager” and/or management for the purposes of a hostile work environment claim:

A “manager is a person who has the authority and power to effect the hours, wages **and working conditions**. “Management“ means one or more managers.

In this matter, it is quite clear that the state is solely focusing on plaintiff’s claims regarding a racially hostile work environment while ignoring the pervasive gender hostile work environment that plaintiff had to suffer through while at the WSPA Training Academy. Also, it is not only the verbal comments being made by her peers and/or her managers but “other conduct” which served to create a hostile work environment with respect to this particular plaintiff.

As discussed in plaintiff's declaration not only were there racial comments made in the environment, but even her managers who were in charge of her training were making gender hostile comments throughout the time that plaintiff was at the training academy. Plaintiff an African American female was provided ill-fitting equipment that impacted her ability to hear and see. Then when she was unable to hear and see she was criticized when she took efforts to try to remedy the situation. Plaintiff was told that she was not aggressive enough and then when she acted aggressively she was told that she was acting "too aggressive."

Plaintiff observed that she was not subject to strict scrutiny and formal-lack standards were being applied to her male peers. She observed that the failings of her peers who were either with and/or male were repeatedly ignored while she had to be for lack of better terms "perfect." Her perceptions that she had to be "perfect" to succeed were reinforced by her superiors who were indicating among other things "if I was his wife or daughter he would not want me to be a trooper." Such belittling statements were not made to male cadets and were made publicly. (CP 95). Plaintiff was hounded with questions about her performance by her training officers while her male peers were not (*Id.* CP 96). Plaintiff was accused of acting like a "high school girl" and was told by her female training officer Corporal Laur that she and one of her female peers were

getting in trouble because they were “females.” Such observation was consistent with the fact that plaintiff was told when engaging in training exercises she sounded like “a flight attendant.” Then again plaintiff’s superiors kept telling her that even the females that she had contact with who had passed through the academy indicated that in order to become a WSPA trooper females had to prove themselves more than males:

The defendant’s statements also seem to focus just on race, when I feel I was also largely if not mainly discriminated against based on sex. **I knew that in law enforcement, females typically have to prove themselves more than males and I was prepared for this.** Sargent Monica Alexander, Trooper Linda Allen and Trooper Angela Hayes had also spoke with me about the struggles of being a female with law enforcement and how they were treated unfairly. This all became very clear during my time at the academy and with the WSP. For example, Corporal Louis made several comments to me and other female candidates that were sexual in nature, such as was it as good for you as it was for me.” He is one of the staff who was frequently getting drunk at the academy. The defendant states that other white male cadets were dismissed from the academy, but they were dismissed for lying or cheating, which I never did, and Caucasian males were given more opportunity to continue with their training than I was. (See declaration of Davis Page 8).

Under the totality of these circumstances, a reasonable jury could conclude that the disparate treatment suffered by the plaintiff, the gender

and racially hostile comments made within this environment perpetrated both by her peers and people in management positions were sufficient to create an actually hostile work environment. See *Schonauer v. DCR Entertainment, Inc.* 79 Wn. App. 808, 820, 905 P.2d 392 (1995) (hostile work environment based on gender); see also *Davis v. West One Automotive Group, supra* (hostile environment based on race).

CONCLUSIONS

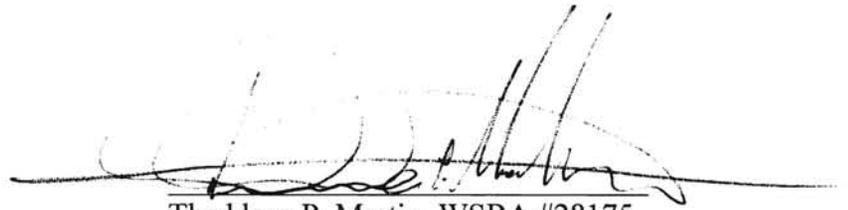
For the reasons stated above, the Trial Court's dismissal of Plaintiff's lawsuit should be subject to reversal in this case and remanded back for trial. The Trial Court did not appropriately apply the rules applicable to motions for summary judgment. The Trial Court went beyond its role in deciding a motion for summary judgment and decided facts as opposed to making a determination as to whether or not genuine issues of material facts existed.

In doing so, it respectfully suggested that the Trial Court failed to provide the Plaintiff with the benefit of having the facts viewed in a light most favorable to her claims. At a minimum there was and is outstanding factual issues as to whether or not the Plaintiff was a victim of disparate treatment, subject to unlawful retaliation, and/or was a victim of a

gender/racially-hostile work environment was attending the WSP Academy.

The issues presented by this case should be resolved by a jury following remand of this case.

Dated this 17th day of October 2013, at Lakewood, Washington.

A handwritten signature in black ink, appearing to read 'Thaddeus P. Martin', is written over a horizontal line. The signature is stylized and somewhat cursive.

Thaddeus P. Martin, WSBA #28175
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF THE APPELLANT'S OPENING BRIEF TO THE COURT OF APPEALS, DIVISION II ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

Peter Helmberger
Attorney General's Office
1250 Pacific Ave, Ste 105
Tacoma, WA 98402

[XXX] by causing a full, true, and correct copy thereof to be e-mailed to the party at the above listed addresses, on the date set forth below followed by legal messenger.

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

Executed at Lakewood, Washington on the 17th day of October, 2013.


Kara Denny, Legal Assistant

STATE OF WASHINGTON
2013 OCT 17 PM 3:09
COURT OF APPEALS, DIVISION II
CLERK OF COURT

EXHIBIT 1

April 09 2013 8:30 AM

KEVIN STOCK
COUNTY CLERK
NO: 12-2-08817-4

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7 SUPERIOR COURT FOR THE STATE OF WASHINGTON
8 COUNTY OF PIERCE

9 ELIZABETH DAVIS, Individually;

NO. 12-2-08817-4

10 Plaintiff,

DECLARATION OF ELIZABETH DAVIS

11 v.

12 STATE OF WASHINGTON; WASHINGTON
13 STATE PATROL;

14 Defendants.
15

16 I, ELIZABETH DAVIS, the undersigned, do hereby declare under penalty of perjury
17 under the laws of the State of Washington, that the following facts are true and accurate and,
18 that if called upon, I can and will testify to the truth thereof:

- 19
- 20 1. I am the plaintiff in this case. I was hired by the Washington State Patrol (WSP)
21 as a Communication Officer Assistant on July 16, 2007. In October of 2007, I
22 filed a harassment complaint about racial remarks in the workplace related to
23 Mexicans and being drunk. It was something along the lines of "when a trooper
24 stops someone after a certain time of day and they have a Hispanic sounding name,
25 you know they are probably drunk." Another comment a coworker said was when
26

Declaration of Elizabeth Davis - 1 of 17

Law Office of Thaddeus P. Martin
4928 109th Street SW
Lakewood, WA 98499
Phone: 253-682-3420
Fax: 253-682-0977

1 a hip hop song came on the radio in the office. She changed the station and was
2 saying how much she hated rap music. She said that she had a certain word for
3 "those people" who listen to rap music. She then looked at me and said she better
4 not say it because it is offensive and she would get in trouble.

- 5 2. This complaint was never resolved, other than being told the issue was addressed.
- 6 3. On June 30, 2008, I was hired by WSP as a Trooper Cadet. I entered the Academy
7 on October 20, 2009 and was assigned to the 97th Trooper Basic Training Class on
8 December 21, 2009. Throughout the training, I was never informed there were
9 issues with my performance until the last week. I was at the top of my class on
10 academic work, excelled on driving and shooting, and passed all objectively
11 measured written and practical exams.
- 12 4. All of my weekly evaluations were positive. My trainers often commented on my
13 ability to handle situations and my ability to take commands.
- 14 5. Other Caucasian cadets who performed poorly were passed and are now troopers.
- 15 6. I was discharged one week prior to the completion of the nine-month training
16 without warning of any unresolved problems or issues.
- 17 7. My Trooper Cadet Job Performance Appraisals were all satisfactory to outstanding
18 over the course of my training.
- 19 8. On countless occasions, ill-fitting equipment was provided to me for exercises, i.e.
20 oversized helmets. I had then failed these exercises because I had removed the ill
21 fitting equipment because it had impaired my hearing and vision. Other cadets
22 were given properly fitting equipment and passed the exercises.
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1 9. In March of 2010, I took an open skills test and my scenario did not record
2 properly. Scenarios before and after me recorded properly. I was yelled at earlier
3 in the day for not being aggressive enough and then was told I failed because I was
4 too aggressive. Another Caucasian male cadet who had the same scenario, ended
5 up in the backseat fighting with the suspect, and passed.
6

7 10. Throughout the training, I was never informed that there were issues with my
8 performance until the last week. I was at the top of my class on academic work,
9 excelled on driving and shooting and passed all objectively measured written and
10 practical exams. My weekly evaluations were always positive. Commissioned
11 troopers often commended me on how well I handled traffic stops. My trainers
12 commended me on my ability to handle situations and my ability to take
13 command. Other Caucasian cadets who performed poorly were passed and are
14 now troopers. Specifically, a Caucasian female cadet, Heather Westerlund, also
15 continuously failed a driving test and she was not terminated as a cadet. A
16 Caucasian cadet, Jeremiah Marceau, also repeatedly performed poorly on exercises
17 and was counseled and coached and given chance after chance, but not terminated.
18 Males in general, especially Caucasian males, were given more relaxed standards
19 and more benefits. I was the only African American and only minority woman in
20 my class of 25 cadets; 19 out of 25 were Caucasian males, 2 Caucasian females, 2
21 Hispanic males and 1 Asian male. I was discharged one week prior to the
22 completion of the nine-month training without prior warning of any unresolved
23 problems or issues. In all previous feedback, I was told I was doing fine.
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1 Caucasian male cadets who failed exercises were given the opportunity for
2 retraining. I was not given the same opportunities as Caucasian male cadets.

3 11. On April 8, 2010, I was dismissed from the Washington State Patrol Academy
4 based unjust and unequal grounds. The dismissal came after I consistently
5 excelled in all objective testing/evaluation as well as the majority of subjective
6 testing/evaluation. I was continually told that I was doing great by Academy Staff
7 and was on multiple occasions told that I did have command presence and was
8 able to take control of situations; which the WSP claimed was the reason for my
9 dismissal. I was one of a small group of cadets specially selected to go straight
10 through from Arming to Basic, based on my excellent performance. My fellow
11 cadets, who spent the most time with me, stated that they would want to work
12 alongside me as a Trooper because of my skills and knowledge.

13
14
15 12. In regards to discrimination and unequal treatment, other White male cadets
16 (Cadet Catton and Cadet Marceau) were consistently being reprimanded by
17 Academy Staff based on their performance and had failed several objective tests,
18 but were given the chance to continue with their training. I failed one subjective
19 test (Open skills CT) towards the end of the Basic and was dismissed after only
20 two tries.

21
22 13. Other male cadets were given three attempts to retest after failing various tests
23 (Cadet Sanchez, numerous others). A White female cadet (Cadet Westerlund)
24 blatantly failed a driving test (crossed over a line), and it was "ignored" by the
25 academy staff (Cpl. Blankers). I was in the vehicle with Cpl Blankers who stated,
26

1 "We'll just ignore that." Cadet Nomani, a male cadet, was given the same scenario
2 as myself for the open skills CT test, and he did far worse (climbed into the back
3 of the patrol car with a drunk subject and engaged in a physical fight) and yet he
4 passed.

5
6 14. Cadet Westerlund, a White female, became ill while at the academy, and she was
7 able to go home for several days.

8 15. On one occasion, I fainted in my room. When academy staff was notified, Cpl
9 Spurling stated, "She's fine, she doesn't need anything. Maybe just drink some
10 juice," and I was sent back to my room to continue getting ready for the days
11 classes. When I was sick, I was made to perform exercises and not given the same
12 accommodations as the Caucasian females.

13
14 16. Open skills CT is a chance for cadets to use control tactic skills in a given
15 scenario, which the staff pick for each cadet. Again, this is a subjective test. I have
16 been on many ride-a-longs with law enforcement officers during my time with the
17 WSP and after, and it is very clear that every officer handles situations differently.
18 This makes it even more difficult to judge open skills CT and unfair to dismiss
19 someone based solely on this exercise. In regards to the open skills CT test, the
20 day prior, I had asked to speak with Cpl Spurling about the high risk stop. Cpl
21 Spurling came to my room where he told me that if "I was his wife or daughter, he
22 would not want me to be a Trooper." I felt very belittled by that statement, and to
23 my knowledge, he had not made statements similar to other male cadets. It was
24 clear that he only made that statement and felt that way because I am a female.
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1 Furthermore, Academy staff usually meets with cadets in their offices. Cpl
2 Spurling came to my dorm room, which offended me because he knew there
3 would be no privacy with all the other cadets around. He told me that I needed to
4 be more aggressive, but when it came time for the open skills CT test, I was told I
5 failed because of using too much force. Also, these scenarios are videotaped so
6 that cadets who fail can review them. Every cadet had his or her scenarios
7 videotaped, but my video mysteriously did not record correctly. This was clearly a
8 set up. The defendant's statements claim that I declined to watch the video, when
9 in fact, Cpl Spurling told me that it did not record correctly, so there was no point
10 in reviewing it.
11

12 17. After retesting for open skills CT, I was not given a chance to explain my actions
13 or have explained to me why I failed. Once again, open skills CT is a subjective
14 test, meaning that it was based entirely on opinion because I passed all objective
15 testing with the top scores. I passed closed skills CT, which is objective, perfectly.
16 The defendant's statements claim that I was not able to explain my actions on my
17 first open skills CT test, when I did explain in detail and was able to give answers,
18 however, Cpl Spurling kept trying to convince the other cadets that what I was
19 saying was not enough and continued to question me. He did not question other
20 cadets or give any of the other cadets as a hard of time as he did with me. A
21 statement by the defendant was also made that Cpt. Estes viewed me during a
22 practice exercise, when this never occurred.
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1 18. The declarations from the other officers claim that I also failed other subjective
2 "tests," however, the academy staff explained to us cadets that high risk stops and
3 building searches were not tests and that they were just to be used as learning
4 experiences. In regards to the high risk stops, I was given equipment that was too
5 big and impaired my vision and hearing, making it extremely difficult to
6 successfully complete the scenario. I had told Academy staff on several occasions
7 that most of the equipment was too large for me and nothing was done and I was
8 told I just had to use what I was given. Cpl Spurling became very agitated during
9 this scenario and yelled at me telling me I sound like a flight attendant, which I
10 took offense to. Another White male cadet saw the gun in the scenario and did not
11 alert the other cadet and myself, yet he "passed." Cpl Spurling claimed that I lifted
12 off my mask to try to exit or escape from the scenario, when in fact, because of the
13 equipment not fitting properly, I was simply trying to hear and see my fellow
14 cadets. I passed high risk stops on my second attempt. In regards to the building
15 searches, Cpl Proudly stated that I was shivering from fear. In fact, I was shivering
16 due to being very cold and I had reported being sick. It was late at night, in the
17 middle of winter. My fellow cadets had chosen not to wear our coats (we all had to
18 dress alike). I was known for always being cold, and was uncomfortably cold from
19 not being able to wear a coat.
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23 19. Cadets are assigned a counselor (an academy staff) who is supposed to meet with
24 them individually once a week to discuss their performance and progress. Cpl Laur
25 was assigned as my counselor. Cpl Laur consistently told me that I was doing well,
26

1 and that she was "convinced I would become a Trooper." There were periods
2 when I would go several weeks without meeting with Cpl Laur, because she stated
3 that I was doing great and there were no concerns. Other male cadets were meeting
4 with their counselors on a regular basis and being counseled on their poor
5 performance throughout their whole time at the academy, however they were
6 never dismissed from the Academy and were able to continue with their training.
7 One evening, Cpl Laur pulled Cadet Westerlund and myself aside and told us that
8 other male staff were complaining about our behavior and were saying that we
9 were acting like high school girls. Cpl Laur went on to say that the only reason we
10 were "getting in trouble" was because we are females, and if we were males, it
11 would not have been an issue. Cpl Laur explained that one of the male staff were
12 going to talk with us, but she thought it would be best if she do it, due to the
13 circumstances of her knowing and admitting it was not fair.

16 20. The Defendant's statements also seem to focus just on race, when I feel I was also
17 largely if not mainly discriminated against based on sex. I knew that in law
18 enforcement, females typically have to prove themselves more than males and I
19 was prepared for this. Sgt Monica Alexander, Trooper Linda Allen, and Trooper
20 Angela Hayes had all spoke with me about the struggles of being a female in law
21 enforcement and how they were and are treated unfairly. This all became very
22 clear during my time at the academy and with the WSP. For example, Corporal
23 Lewis made several comments to me and other female candidates that were sexual
24 in nature, such as "was it as good for you as it was for me." He was one of the
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1 staff who was frequently getting drunk at the academy. The defendant states that
2 other White male cadets were dismissed from the Academy, but they were
3 dismissed for lying or cheating, which I never did, and Caucasian males were
4 given more opportunities to continue with their training than I was.

5
6 21. Cpl Laur claims that she counseled me on my lack of command presence and
7 needing to be able to take control, when this is not true. She never expressed
8 concerned until I had failed the open skills CT, and she still did not counsel me at
9 that time. She just advised that I speak with Cpl Spurling. Cpl Laur's statement
10 regarding the evening when she spoke with Cadet Westerlund and I about our
11 behavior is completely incorrect as well. Cadet Westerlund and I were not
12 whispering during Cpl Tegar's water course. We were sitting before class had
13 even started and were two of only a few cadets who were in the pool area (other
14 cadets were getting dressed in locker room) and we had just eaten lunch. We were
15 discussing how uncomfortable it was to be in swimsuits after just eating. Class had
16 not started yet and we were not disturbing any other cadets. Cpl Varkevisser once
17 told Cadet Westerlund and I that he thought our relationship was a good thing
18 since we were so supportive of each other, and he in fact started talking negatively
19 about Cadet Kavanaugh and was soliciting us to talk about her as well. It was
20 never discussed that Cpl Laur thought we should stop "whispering," as that she
21 was telling us that the conversation she was having us should not have even been
22 happening but she told the other staff she would take care of it. Cadet Westerlund
23 and I never told her we understood and we would work on our behavior. We were
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1 both very hurt and upset, and felt singled out because of our sex. It should also be
2 pointed out that male cadets were extremely immature and would fart and joke
3 during class and call each other, "bud" or "bro," and they never were reprimanded
4 like Cadet Westerlund and I were.

5
6 22. On Exhibit 4 (page 2) from Helmberger's declaration, when I signed the form,
7 "Barley," written above the box marked "pass," was NOT present. To my
8 knowledge, that was added after I signed. Huss' statement claims that as I was
9 going through the Academy, that I "continued to exhibit timid behavior." This was
10 never brought to my attention until the last week prior to my termination and the
11 opposite is documented in my performance reviews- that I was aggressive and had
12 sufficient command.

13
14 23. Cpl Laur's statement discusses several occasions when I told her that other cadets
15 were making racial remarks, as well as saying, that I was only chosen to go
16 straight through to Basic because I am a Black female. The cadets would say that I
17 only made it through to basic because I am a black female and the WSP needed
18 diversity. They also joked about how the staff had all the dark skinned cadets
19 sitting at one table. Cpl Laur's declaration states that I chose to just "drop it."
20 This is not true. Cpl Laur did appear to be upset and disappointed when I shared
21 this information with her, but when she asked if I just want to handle it, it came
22 across like she did not want to be involved, which is why I said I would just handle
23 it. I never said that I just wanted to drop it though.
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1 24. In Sgt Huss' statement, he stated that he observed me approaching a vehicle as if I
2 was "walking on eggshells." In fact, I was taking the scenario seriously and was
3 approaching a vehicle with unknown circumstances, using caution and officer
4 safety.

5 25. Sgt Arnold was playing the role of a violator who I contacted during an exercise.
6 Cadet Kavanaugh was also in the vehicle with Sgt Arnold. Later that day, Cadet
7 Kavanaugh informed me that Sgt Arnold stated to her, "Cadet Griffin is going to
8 be a great Trooper." The defendant did not obtain a statement from Sgt Arnold.
9 Cpl Richmond also observed my performance during this exercise, and had no
10 corrections for me and told me that I handled scenes very well and was able to take
11 control. Troopers also came to the academy to observe and evaluate our
12 performance during exercises. In regards to the night time practical exercise, the
13 Trooper who evaluated my performance stated that I took control of the scene and
14 commended my performance. This was the case for all other practicals as well,
15 when Troopers outside of the Academy came to evaluate. I would like to point out
16 that I was dismissed from the Academy one week prior to mega practicals. Mega
17 practicals are when Troopers (coaches) from outside the academy evaluate cadets'
18 performance on practicals throughout the whole day and night for several days. I
19 was dismissed before other outside sources could evaluate my performance. It
20 appears that academy staff did not want me to have the chance to be evaluated by
21 someone else who would say that my performance was exemplary. It was their last
22 chance to dismiss me, based on subjective exercises.
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1 26. Becoming a Trooper was something that I was very passionate about and worked
2 extremely hard for. When reading the defendant's statements, one can see that I
3 excelled in most areas and up until that last week, where I "failed" only subjective
4 exercises. In other words, for exercises that were judged subjectively or by the
5 opinion of the evaluator, they can pass who they want to pass and fail who they
6 want to fail based on their will and not on actual performance. Again, other male
7 cadets and another White female cadet were given more opportunities to continue
8 with their training, which I was not afforded. Favoritism was also shown to male
9 cadets and the White female cadet as explained above. Cadet Paxton (White male)
10 was extended on his couching trip 3-4 times before finally being terminated. Cadet
11 Nomani was AWOL from the military and the academy staff bent over backwards
12 to "save him" from getting in serious trouble or being deployed. Male cadets from
13 other classes were also able to continue on with their training after failing open
14 skills CT.
15

16
17 27. Multiple commissioned Troopers I have ridden with have complemented me on
18 how well I handle traffic stops and my ability to communicate effectively with the
19 public. Some even requested that I complete the duties required, as the public was
20 responding to me better than them. My fellow cadets reported command presence
21 as exceeding many of the males at the academy and they would want to partner
22 with me during exercises. My husband, who at the time was a commissioned
23 Trooper, was approached my Academy staff on several different occasions and
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1 told that I was doing exceptionally well and that they did not have any concerns
2 for me becoming a Trooper.

3 28. It is also important to point out that on numerous occasions, academy staff would
4 stay overnight at the academy and be extremely intoxicated. When they would
5 encounter cadets in the dorms, they would talk poorly about other cadets and
6 discuss what was said during their staff meetings. After a night of drinking, the
7 staff would conduct class the next day, obviously hung-over.
8

9 29. In my first position with WSP in Bellevue Communications, I filed a complaint
10 against a coworker who created a hostile work environment and would make racist
11 comments to and around me. She was allowed to come back to work after an
12 internal and criminal investigation and I was never informed of what action was
13 taken against her.
14

15 30. The defendant focuses on my lack of command presence, officer safety, and
16 inability to control scenes. As explained above, I was continuously told that I did
17 have these traits, and this is documented in the exhibits. I would also like to point
18 out that the definition of command presence is not to yell and always be aggressive
19 with violators/suspects, but to be able to professionally handle and resolve
20 situations with confidence, which I was able to do.
21

22 31. I currently work in crisis services in an ER. On a nightly basis, I come in contact
23 with psychotic, agitated, violent, individuals who may be high on meth, bath salts,
24 alcohol, PCP, etc. My coworkers and I either have to verbally diffuse combative
25 individuals or go hands on. We do not have any weapons or protection other than
26

1 our hands. I have been in my current position for almost two years and have not
2 been assaulted or caused any of my coworkers to be assaulted. This is because of
3 my command presence, safety, and ability to control situations. Prior to working in
4 the ER, I was working at Western State Hospital with criminally insane patients,
5 on an all male ward. Again, I was never assaulted or risked anyone else's safety.
6

7 32. One week prior to my dismissal, I was told that I was "too smart for this job" by
8 the training staff. This was one of the first main indicators that something wasn't
9 right. On the day of my dismissal, I was told that I either needed to resign or be
10 fired. Before I made decision, I asked why this was happening. Academy staff
11 became agitated, defensive, and refused to give me an answer and told me that I
12 just needed to choose. I chose to be fired because I did not and do not feel that I
13 was dismissed for fair or appropriate reasons.
14

15 33. Pertaining to Cpl Spurling's declaration, Exhibit A, he stated that I did not ask for
16 backup, when I know did. The vehicle's being apart is not what made
17 communication difficult. Communication was difficult due to my helmet not
18 fitting correctly. My PA volume may have been low, however prior to this
19 exercise, all cadets tested the volume of their PA, my partners in this exercise told
20 me that mine was loud enough. My introduction was not weak and was confident
21 and I gave clear instructions to the violators. Cadet Boukabou and myself both did
22 not see the gun. Cadet Mertens later said that he did see it, but he did not alert the
23 other cadet and I. Cadet Mertens passed. The suspect was never out of ammo and
24 never fired because his gun was broke, and would not fire to begin with. I did not
25
26

1 pull my taser or say taser. I did take off my helmet and walked to the back of my
2 patrol car but this was to be able to maintain communication and find my other
3 partner, Cadet Mertens, who was not communicating with Cadet Boukabou or me
4 at all. I had to take off my helmet to be able to see and hear because it was too big
5 and kept blocking my eyes and ears. Cpl Spurling wrote that I was unable to
6 control the scene and my partners had to take over. My partners did not take over
7 and as explained earlier, communication was difficult due to WSP purposely
8 giving me non-fitting equipment and Cadet Mertens not paying attention. At the
9 beginning of the scene, Cpl Spurling informed us how many suspects there were
10 and how many weapons were involved. At one point, I did turn my back to the
11 suspect vehicle, but this was after all suspects had already exited the vehicle. I was
12 thinking tactically and was aware of safety issues, because I knew no suspects
13 were remaining in the vehicle and the person I was cuffing needed to be cuffed
14 immediately. Mertens never took over. Again, I did not take my helmet off to exit
15 the scenario or to breathe. I did this to be able to see and hear. The helmet made
16 communication extremely difficult. I did use a command voice. I demonstrated
17 officer safety by taking off my helmet to ensure that my partners were okay and I
18 knew there were no more safety risks while I was cuffing the suspect. At the end
19 of this form, one can see that I never signed on the line where it says "cadet
20 signature." This form was not shown to me.

24 34. Open skills CT- Again, I did not decline to watch the video. Cpl Spurling told me
25 that most of the scenario did not record, so there was no point in watching it. If
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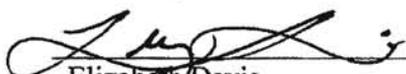
1 circumstances were different, I would have absolutely watched the video like other
2 male cadets had the chance to do. I was never counseled on what I supposedly did
3 wrong on my second attempt. This was all part of the set up to get rid of me.

4 35. Our first written exam at the academy was on ethics. I found an error on the test
5 and it was marked that I got a question wrong, when in fact I was the only cadet
6 who got it correct. I pointed out this error and academy staff agreed that I was
7 correct, but I was never given that point when I was told I would. If I had been
8 given this point, I would've been at the top of the academic list, above other
9 Caucasian males, sooner. We were also given a written "use of force" exam in
10 arming. Cadets are told that if they get 100% on this exam the first time, they will
11 not have to take it again in Basic. I did in fact get 100%. When I pointed this out to
12 Cpl Spurling, he said that I would still have to take it again. The second time, I got
13 100% again.
14

15
16 36. Clearly, I was treated differently based on my gender, the intent of which is
17 evidenced by the comments, and based on race because of my previous complaint
18 and the fact that WSP did not take my complaint that other cadets were engaging
19 in racial conduct and did nothing about it.
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1 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
2 STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

3
4 EXECUTED this 8th, day of April, 2013 at Lakewood, Washington.

5
6 
7 Elizabeth Davis

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