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No. 72666-8-I

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

IGNACIO MARIN,

Appellant,

vs.

KING COUNTY, WASHINGTON,

Respondent.

BRIEF OF RESPONDENT KING COUNTY, WASHINGTON

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I. INTRODUCTION

Plaintiff Ignacio Marin's ("Marin") appeal from the jury's unanimous (12-0) verdict for King County, Washington is meritless. Plaintiff's arguments lack meaningful support in the record or the law. Indeed, the evidence plaintiff introduced before the trial court was so insufficient that no reasonable jury could have found in favor of plaintiff on his hostile work environment or accommodation claims. As a result, even if any of plaintiff's assignments of error had merit (which is not the case), any such error would be harmless.[1]

At trial, plaintiff failed to show that the County subjected him to a hostile work environment or denied him accommodations for his psychological conditions. Instead, the evidence proved that the County made extensive efforts to accommodate Marin, and that his coworkers and supervisors treated him with the same level of professionalism as each other. Nevertheless, Marin accused people on three different crews (with no overlap) at two different plants of mistreatment in a period of less than three years, any time he committed a significant error in performing his job, based solely on his unsupported belief that he was being singled out.

[1] King County withdraws its appeal from the trial court's partial denial of its directed verdict motion and addresses this issue only to explain why any error would be harmless.

The record at the summary judgment stage was similarly devoid of wrongdoing. Although plaintiff claims that he was subjected to disparate treatment and retaliation, the fact is that his personnel record contains no discipline and the County never tried to fire him. Rather, plaintiff elected to retire, and his decision to do so was unilateral and voluntary.

In his brief, plaintiff attempts to circumvent this background by mischaracterizing the record. For example, plaintiff makes the inflammatory argument that "the County's attorney intentionally and repetitiously 'tagged' Marin with the word 'Paranoid' numerous times, despite no diagnosis of a paranoia related mental illness. . . ." Pl.'s Br. at 57. This is untrue. The very testimony cited by plaintiff reflects that the County's expert psychiatrist, Dr. Mark McClung, diagnosed Marin with "adjustment disorder with paranoid personality traits" and offered that opinion at trial without objection. *See* RP 9/24/2014 at 66:5-9 (cited in Pl's Br. at 57). This is but one example of plaintiff mischaracterizing the record. In this response, King County seeks to clarify these issues as much as practicable, recognizing that it would be impossible to respond to every inaccurately characterized citation in plaintiff's brief.

In sum, plaintiff has not identified any reversible error committed by the trial court. The jury's unanimous verdict should be affirmed.

II. STATEMENT OF THE CASE

A. Procedural Background

Plaintiff's Complaint asserted claims against his former employer, King County, for (1) hostile work environment, pursuant to the Washington Law Against Discrimination ("WLAD"); (2) disparate treatment under the WLAD; (3) failure to accommodate disabilities under the WLAD; (4) wrongful discharge; (5) intentional infliction of emotional distress; and (6) negligent infliction of emotional distress. CP 1755-56. Plaintiff based the hostile work environment and disparate treatment claims on allegations of both discrimination and retaliation. On November 20, 2013, Judge Michael Trickey entered summary judgment for King County on four claims, allowing only the accommodation and hostile work environment claims to go forward. *Id.*

On December 2, 2013, plaintiff moved for partial reconsideration, arguing that he should be permitted to pursue a stand-alone claim for retaliation separate from the hostile work environment claim. CP 1795-1804. The trial court denied that motion on January 3, 2014. CP 1833-34.

The case went to trial in September 2014. After plaintiff completed his case, King County moved for a directed verdict. CP 3121-3133. The court did not consider the motion until September 24, after the County had completed its own case. CP 6575-76. At that point, the court

granted the motion in-part and denied it in-part. The court submitted the hostile work environment and accommodation claims to the jury, but found that plaintiff did not produce evidence that any alleged harasser knew he engaged in protected conduct. Therefore, the court dismissed the retaliation component of plaintiff's hostile work environment claim. *Id.*

Finally, after a nearly month-long trial, the jury rendered a unanimous verdict for King County on Marin's hostile work environment and accommodation claims. RP 9/25/2014 at 96:9-99:6; CP 3139-40.

B. Factual Background Based on the Trial Record

1. Plaintiff's Transfer from West Point to Renton

Plaintiff is a former Wastewater Treatment Division ("WTD") operator, where he worked for 28 years. *See* Pl.'s Br. at 5. In light of the massive size (in acres) of the treatment plants, operators are responsible for separate sections of each plant and have limited interaction. *See, e.g.*, RP 9/17/2014 at 168:21-169:25; RP 9/23/2014 at 86:11-87:12. Their core duties include operating various types of equipment (both hazardous and non-hazardous) involved in treating wastewater, responding to emergencies, ensuring compliance with safety procedures, and cleaning the treatment plants. *See* Trial Ex. 449; RP 9/11/2014 at 79:15-80:15.

The limitations period began in 2008. Pl.'s Br. at 17; CP 1755. As of that time, Marin was an operator on the "D Crew" at the West Point

treatment Plant in the Magnolia neighborhood of Seattle. Marin and his supervisor, James Sagnis, were "good friends." RP 9/18/2014 at 58:5-18. In April 2009, however, Sagnis received a complaint from an acting supervisor that Marin had refused to follow a priority directive issued by plant management. Sagnis reviewed Marin's logs and confirmed that he had chosen to perform low priority work rather than following the priority established by management. RP 9/18/2014 at 93:5-98:2. Sagnis then issued Marin a documented oral reprimand on May 10, 2009. Trial Ex. 83. That reprimand was the lowest level of discipline available under union rules, RP 9/22/2014 at 15:16-24, and plaintiff does not contend that it affected his pay, benefits, or duties. Nevertheless, Marin challenged the reprimand via the union grievance process. Trial Ex. 84. Marin then hired a lawyer and, on June 19, 2009, made a discrimination complaint to Human Resources. RP 9/9/2014 at 122:13-123:10.

Human Resources met with Marin and his lawyer about his complaint. Marin and his lawyer requested a transfer to the South Plant in Renton while the complaint was being investigated. RP 9/23/2014 at 122:16-123:6. The County granted that transfer immediately. Trial Exs. 89, 467. The transfer was not consistent with union rules because it did not follow the standard seniority bidding process, which meant the County had to make a special exception for Marin. RP 9/23/2014 at 123:7-24.

Transferring to the South Plant was considered highly desirable to operators at West Point, due to its more convenient location in Renton. RP 9/9/2014 at 183:24-185:1. Marin himself preferred to work at the South Plant, in part because of the location. Trial Ex. 486.

In addition to requesting a transfer to the South Plant, Marin also sought assignment to the C Crew because he wanted to work with Jim Alenduff, a supervisor Marin knew and liked. RP 9/9/2014 at 182:24-183:19; RP 9/23/2014 at 122:12-123:6. Once again, the County granted Marin's request. *Id.* Marin was initially content on C Crew and expressed that he wanted to join the crew permanently. However, Marin eventually became unhappy after he committed a number of errors that put crew members in "jeopardy." RP 9/18/2014 at 33:8-35:22. He then lodged a complaint regarding his new coworkers, RP 9/9/2014 at 152:2-153:20, and decided to move to the South Plant's B Crew, supervised by Cheryl Read. RP 9/17/2014 at 82:14-83:17. Realizing Marin was unhappy on Alenduff's crew, Read had reached out to him and invited him to join her crew. Marin admits that Read was widely regarded as an excellent supervisor, that her behavior toward him was "compassionate," and that he was "very blessed" to be on her crew. *Id.* Marin worked for Read for more than a year, until he unilaterally retired. He admits that during the

vast majority of his time on Read's crew, he felt "productive, trusted, appreciated, and fulfilled." *See, e.g.*, Trial Ex. 159.

2. King County's Attempts to Accommodate Marin and Investigate His Complaints

While Marin was at Renton, the County hired an outside investigator, Karen Sutherland, to investigate his complaint regarding the West Point D Crew. When Sutherland interviewed Marin, he did not allege that the individuals against whom he was complaining, James Sagnis and Mark Horton, were motivated by discrimination. *See* RP 9/17/2014 at 132:16-135:2. Ultimately, after conducting an extensive investigation, Sutherland found no evidence of discrimination, and the County relied on her findings to that effect. RP 9/22/2014 at 17:9-18:18.

When Marin complained about the C Crew, the County hired Sutherland to investigate a second time. Marin refused to participate in that investigation, however, through his counsel. RP 9/10/2014 at 32:10-33:12. Nonetheless, Sutherland did conduct an investigation and again concluded that there was no discrimination. RP 9/9/2014 at 166:16-23; RP 9/10/2014 at 11:2-12:22.[2]

[2] Human Resources also investigated a separate pornography charge lodged by Marin against Alenduff, and terminated Alenduff on that basis. RP 9/9/2014 at 170:11-22.

As a result of the D Crew findings, the County decided to return Marin to West Point. Trial Ex. 478. After Human Resources conveyed that to Marin, however, he and his counsel asked for the transfer to Read's crew to be made permanent as an accommodation for post-traumatic stress disorder (PTSD). Trial Ex. 159; RP 9/23/2014 at 123:25-125:13. The County granted that transfer. Trial Ex. 167. After Marin's transfer became permanent, he repeatedly told Human Resources and Disability Services that he did not need any other accommodations because he was "happy" on his crew and his coworkers were "supportive." RP 9/22/2014 at 49:20-52:13, 57:19-61:24; RP 9/23/2014 at 131:7-134:19.

In addition, at the same time as the County investigated Marin's discrimination complaints, it also evaluated his grievance regarding the reprimand. On March 15, 2010, the County concluded that the reprimand had been based on a misunderstanding and decided to withdraw it, per Marin's request. *See* Trial Ex. 162. As a result, the reprimand is not part of Marin's employment record. RP 9/23/2014 at 137:3-23.

3. Plaintiff's Unilateral and Voluntary Retirement

On December 9, 2010, while working on B Crew, Marin made a serious error that could have harmed a coworker. Specifically, he failed to shut down a raw sewage pump and lock it out at the power source—a procedure known as a "lockout"—before a maintenance employee

performed work on it. *See* Trial Ex. 519. This lockout was a routine task for operators, and Marin had been shown how to perform it correctly. *See* RP 9/22/2014 at 168:18-171:21. Nevertheless, Marin failed to lockout the pump, but still informed his colleagues that he had done so. RP 9/23/2014 85:2-86:10. After this error was discovered by a coworker, Marin admitted to Read that he had "goofed." RP 9/23/2014 at 94:6-24. Read was "surprised" by Marin's error because it was inconsistent with his training. *Id.* at 97:7-17; 197:22-199:16. On January 5, 2011, Read coached Marin on lockout procedures and gave him a memo, titled a "teach/lead/coach" ("TLC"), which documented the error but did not impose discipline. Trial Ex. 519; RP 9/23/2014 at 202:8-203:19. Marin does not contend that the TLC affected his pay or job duties. Other WTD employees have received formal discipline, such as a documented oral reprimand, for their own lockout errors. *See* Trial Exs. 261-62.

Following receipt of the TLC on January 5, 2011, Marin took medical leave. During the four months in which he was on leave, the County tried to engage him in an interactive process. Initially, he sent the County doctor's notes claiming his PTSD was aggravated at work. *See* Trial Ex. 214. However, the County needed more information regarding his condition and his experiences so that it could determine how to accommodate him and return him to work. *See* RP 9/23/2014 at 147:18-

162:19. The County sent Marin and his counsel several letters requesting that information, but they did not provide it. The County requested a release to speak with his doctors, but he did not deliver one. And the County tried to call Marin at home, but he never called back. *Id.*[3]

Instead of engaging in the interactive process with King County, Marin gave notice that he was retiring effective May 1, 2011. Trial Ex. 582. The County did not fire Marin; his decision to retire was voluntary. RP 9/17/2014 at 72:3-11. Marin's unwillingness to communicate with the County or to return to work has never been fully explained. His psychologist's opinion, however, is that he suffers from mental conditions which prevent him from continuing to work in sewage treatment for King County or any other employer. RP 9/11/2014 at 50:2-51:6.

4. The Nature of Mr. Marin's Medical Conditions

Marin suffered from psychological conditions which impaired his ability to perform the essential functions of his job. Unknown to King County, Marin suffered from anxiety, depression, and panic attacks since the 1990's in connection with events at work and home. *See, e.g.*, RP

[3] Although Marin's counsel did send letters, their letters contained none of the requested information. For example, after Marin retired, they filled out a questionnaire on his behalf generically stating he could return to work if "released with accommodation." Trial Ex. 236. This form did not identify the needed accommodations, and Marin's own testimony is that he did not authorize or agree with its contents because he was not capable of working in *any* job when it was submitted. RP 9/17/2014 at 148:5-151:8.

9/10/2014 at 152:4-155:3. According to Marin's psychologist, E.B. Vance, his "reactions to situations are different than those reactions of the normal or average person[.]" RP 9/11/2014 at 73:13-17; *see also* RP 9/11/2014 63:5-10 (Marin exhibited a "high level of reactivity"). When his anxiety is triggered, he experiences "rapid heart rate, mental confusion, the inability to concentrate and impaired reasoning and judgment." *Id.* at 27:3-10. The "very nature" of Marin's job in a sewage treatment plant, including his responsibility for responding to emergency situations, can give rise to these attacks. *See id.* at 82:6-15. Indeed, these attacks have also been triggered by very minor events outside work, such as "becoming warm in a retail store." RP 9/10/2014 at 162:14-163:21.

The correct diagnosis for Marin's conditions was disputed at trial. Marin's providers, including Dr. Vance, drafted letters to the County claiming he had PTSD. *E.g.*, RP 9/11/2014 at 35:11-18. Dr. Vance admits, however, that this diagnosis was "probably" wrong. *Id.* at 72:17-74:7, 147:1-5. The County's expert, Dr. McClung, also refuted the PTSD diagnosis. Based on psychiatric exams and other research, Dr. McClung diagnosed Marin with adjustment disorder, somatic disorder, and paranoid personality traits. RP 9/24/2014 at 40:8-45:1; 66:5-9.

III. ARGUMENT

Below, King County first identifies several assignments of error which plaintiff has waived by failing to make meaningful argument or to cite authority in his opening brief. Next, the County proceeds through each of plaintiff's remaining assignments of error in the chronological order in which each issue arose before the trial court.

A. Plaintiff Waived Assignments of Error 3, 8, 11, and 17-18, by Failing to Make Meaningful Argument or Cite Authority

Plaintiff has taken a kitchen sink approach to this appeal, making every possible argument, regardless of merit, in the hope of reversing the jury's unanimous verdict. Indeed, many assertions in plaintiff's brief are not supported by meaningful argument or citation to authority. Plaintiff has waived each such assignment of error. *See, e.g.*, *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 862, 292 P.3d 779 (2013) (declining to consider error that was not supported with authority); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002) (similar); *State v. McNeair*, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997) (failure to cite authority deemed a concession that argument lacks merit). Plaintiff's brief identifies eighteen assignments of error, five of which are so clearly waived that the County does not address them on the merits.

1. Plaintiff's third assignment relates to the trial court's decision to exclude evidence pre-dating the limitations period. Pl.'s Br. at 2. Plaintiff cites no authority in support of his position. Pl.'s Br. at 27-28.

2. Plaintiff's eighth assignment relates to the court's refusal to supplement the record with a copy of an email from a juror. Pl.'s Br. at 2. Plaintiff does not address this issue anywhere in his brief.

3. Plaintiff's eleventh assignment relates to the court's refusal to provide an extra peremptory challenge after plaintiff had completed his challenges. Pl.'s Br. at 2. Again, plaintiff cites no authority. *Id.* at 37-38.

4. Plaintiff's seventeenth assignment relates to the court's award of costs. Pl.'s Br. at 3. Plaintiff's legal argument amounts to one vague and incomplete sentence: "Statute [*sic*] authorized few of the costs." Pl.'s Br. at 59. The County is unable to ascertain which costs plaintiff believes should not have been awarded, nor why. This issue has been waived.

5. Plaintiff's eighteenth assignment refers to both the court's denial of instructions regarding "inherent and actual bias" and its denial of "Batson" motions. Pl.'s Br. at 3. Plaintiff makes no specific argument as to why either decision was error, opining only that the trial involved "overt and implicit 'bias'" that "cries out for a remedy." Pl.'s Br. at 60.

The County does not address these assignments of error on the merits. The County also believes that plaintiff waived assignments 13 and

14, as well as some of his underlying arguments regarding assignments 5 and 7. The County does address those assignments in more detail, below.

B. Plaintiff Unlawfully Recorded His Supervisor and Withheld the Recordings in Discovery: Assignments 5, 12, and 15

In 2009, plaintiff secretly recorded two private meetings with James Sagnis. CP 256-57, ¶¶ 7-9. During discovery, his counsel admitted that, after learning about these recordings, they chose not to produce them until after Sagnis' deposition. CP 44-54, at ¶¶ 3-5, 10-11. The Honorable Judge Trickey, who then presided over the case, held that the recordings violated the Washington Privacy Act, RCW 9.73.030; and sanctioned plaintiff's counsel $5,000 for intentionally withholding them in discovery. CP 1089-96. This Court affirmed on interlocutory appeal. CP 5736-39.

1. The Trial Court Correctly Held that Plaintiff's Secret Recordings Violated the Privacy Act

In Washington, it is "unlawful for any individual" to "record" any "private conversation . . . without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030(1). Plaintiff does not dispute that he recorded two conversations without Sagnis' consent, but assigns error to the trial court's finding that the conversations were "private" under the statute. Pl.'s Br. at 40-44. The Washington Supreme Court gives the term "private" its "ordinary and usual meaning":

> [B]elonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.

State v. Clark, 129 Wn.2d 211, 224-27, 916 P.2d 384 (1996) (ellipses in original; quotation omitted). In assessing this element, courts consider the (1) "duration and subject matter of the conversation," (2) "location of [the] conversation and presence . . . of a third party"; and (3) "role of the nonconsenting party and . . . relationship to the consenting party." *Id.*

The trial court considered evidence pertaining to each of these factors, finding the secretly recorded conversations "were lengthy"; involved only "[t]he same two people"; "occurred in an office at work"; and there was "no evidence any third party was present." CP 1090-91. Plaintiff does not challenge these findings, Pl.'s Br. at 40-43, which amply support the court's determination that the conversations were "private." Instead plaintiff argues only that the conversations were "public in nature" because they took place between two government employees, each of whom *subsequently* revealed limited portions of what was said. Pl.'s Br. at 43. Plaintiff does not support this theory with authority, and the trial court correctly rejected it as contrary to public policy. CP 1092 (the court: "such a construction would mean that supervisors could record these conversations without the consent of their employees"). This Court

affirmed on interlocutory review, holding that "[w]hether either party to the conversation later intended to discuss Marin's employment situation with others does not render the conversations not private." CP 5738.

Plaintiff's efforts to distinguish the cases relied upon by the trial court are unavailing. Most significantly, in *Smith v. Employment Security*, 155 Wn. App. 24, 226 P.3d 263 (2010), the Court of Appeals affirmed that certain conversations between public employees in the "office" and other locations were "private" as a matter of law, foreclosing plaintiff's current argument that government employees cannot have "private" conversations at the office. *Id.* at 39. Plaintiff does not cite any contrary authority.

2. The Trial Court Correctly Found that Plaintiff's Counsel Willfully Withheld the Unlawful Recordings

The trial court correctly found that plaintiff's counsel intentionally withheld the recordings until after Sagnis' deposition. CP 1093-94. Plaintiff provides a lengthy recitation of alleged facts underlying his counsel's failure to produce the tapes, but ignores the factual predicate for the trial court's holding. Mark Rose, an associate supervised by two partners, Mary Ruth Mann and Jim Kytle—all of whom were counsel of record for plaintiff—submitted a declaration admitting he was aware of the recordings as of June 19, 2012, and that he knew they were responsive to King County's requests for discovery. CP 44-46. He informed Ms.

Mann and Mr. Kytle of the recordings, then took the deposition of Sagnis on June 29. CP 45-46. Nevertheless, plaintiff did not produce the recordings until July 5, six days after the deposition. CP 52. This testimony properly formed the basis for the trial court's finding that plaintiff's counsel intentionally withheld these tapes. CP 1093-94.

Plaintiff's counter-recitation of facts does not rebut this evidence. Rather, it only raises strawmen. For example, plaintiff claims that the County's discovery requests did not define "documents" to include "recordings." Pl.'s Br. at 49. But that is irrelevant because the definition of "documents" he cites does include "tapes."[4] CP 3657 (cited in Pl.'s Br. at 49). Further, plaintiff's claim that Ms. Mann did not sign the discovery responses is misleading: plaintiff's brief cites to his June 8, 2012 *supplemental* responses, signed by Mr. Rose, Pl.'s Br. at 38 (citing CP 3732-33), but omits that Ms. Mann signed plaintiff's *original*, April 13, 2012 responses, CP 3722. Of course, regardless of who signed those responses, Mr. Rose was Ms. Mann's subordinate lawyer and co-counsel for plaintiff, necessitating the same result. CP 44-46; *see also* RPC 5.1.

[4] Mr. Rose also admitted that he knew the recordings were responsive to separate discovery requests which used the term "recordings." CP 1095.

3. The Trial Court Properly Sanctioned Plaintiff's Counsel

Plaintiff asserts, without citation to authority, that the court erred in sanctioning his counsel because it "applied CR 37 case law" to a violation of CR 26(g). Pl.'s Br. at 46. That argument is meritless because the court only awarded monetary sanctions. CP 1096. The Supreme Court has distinguished this type of sanction from the "harsher remedies allowable under CR 37(b)," such as dismissal, and affirmed an award of monetary sanctions based on a *lesser* showing than is necessary under CR 37. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 686-90, 132 P.3d 115 (2006). Even if the trial court was not *required* to apply the rigorous CR 37 test, it did not err in doing so and plaintiff was not harmed by that approach.

Indeed, plaintiff's objection boils down to the theoretical *risk* that the trial court's application of CR 37 factors *could have* resulted in a more severe sanction. Pl.'s Br. at 47 (complaining that the trial court's approach would "turn every routine motion to compel into a Burnet-Rivers sanctions opportunity"). In light of the fact that the trial court did not award such sanctions, it committed no reversible error as a matter of law.

4. The Trial Court Did Not Rely on Character Evidence

Plaintiff's argument that the trial court relied on "character evidence" in finding that his counsel's conduct was intentional is inaccurate. *See* Pl.'s Br. at 70-72. Instead, the court's order makes clear

that it only relied on Ms. Mann's history of sanctions in determining the *severity* of her violation. CP 1095 ("The Court deems this violation to be serious, particularly in light of Ms. Mann's history of sanctions in previous cases. . . ."). It was appropriate for the court to rely upon that history in deciding the appropriate sanction. *See* American Bar Association, *Standards for Imposing Lawyer Sanctions*, § 9.22(a) (1991) (defining "prior disciplinary offenses" as an "aggravating factor").[5]

5. The Trial Court Properly Excluded Inadmissible Evidence Regarding the Unlawfully Recorded Meetings

As set forth above, the trial court correctly ruled that Marin violated the Privacy Act by secretly recording two private meetings with Sagnis. At the same time, the trial court ruled that the tape recordings were inadmissible and that Marin could not testify regarding the two meetings. CP 1092-93. Afterward, the trial court also excluded Marin's out-of-court statements regarding the meetings and precluded plaintiff from eliciting testimony from Sagnis on that topic, after Sagnis' recollection of events was altered by listening to the recordings. CP 2959-60; *see also* CP 5731-32 (Sagnis' errata reflecting altered recollection).

[5] *See also, e.g.*, *In re Disciplinary Proceedings Against Cohen*, 150 Wn.2d 744, 761-62, 82 P.3d 224 (2004) (prior misconduct was aggravating factor in deciding sanction).

Independent from plaintiff's argument that the recordings were not unlawful and that his counsel should not have been sanctioned, plaintiff separately posits that the court erred in excluding the foregoing evidence regarding these meetings. Pl.'s Br. at 29; *see also* CP 2959-60 (copy of the trial court's order). However, plaintiff cites no authority in support of this separate theory, waiving this argument. *Supra* III.A. This argument is also wrong on the merits. Plaintiff's violation of the Privacy Act required the exclusion of "all evidence" regarding the contents of the secretly recorded conversations. *Schonauer v. DCR Entm't, Inc.*, 79 Wn. App. 808, 819, 905 P.2d 392 (1995) ("The trial court did not err by excluding all evidence pertaining to that conversation."). Further, the evidence subject to that motion, such as documents describing plaintiff's out-of-court statements about the meetings, required exclusion for the independent reason that it was inadmissible hearsay.[6] *See, e.g.*, Trial Ex. 67. The trial court did not abuse its discretion in excluding this evidence.

C. The Court Correctly Granted Summary Judgment on the Disparate Treatment and Retaliation Claims: Assignment 1

The Superior Court correctly dismissed plaintiff's disparate treatment and retaliation claims on summary judgment because plaintiff

[6] Sagnis' testimony regarding the meetings was also properly excluded because Marin's counsel's discovery abuse in withholding the recordings until after Sagnis' deposition prejudiced the County by tainting his testimony and his memory. CP 5731-32.

failed to submit evidence "sufficient to persuade a fair-minded, rational person of the truth" of each element of these claims. *See Cox v. O'Brien*, 150 Wn. App. 24, 33-34, 206 P.3d 682 (2009). This Court's review of the trial court's summary judgment order is *de novo*. *Id.*

To establish a discrimination claim based on disparate treatment, a plaintiff must prove that he was (1) a member of a protected class; (2) subjected to an "adverse employment action"; (3) "doing satisfactory work"; and (4) the adverse action "occurred under circumstances that raise a reasonable inference of unlawful discrimination." *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 488, 84 P.3d 1231 (2004). To the extent a plaintiff bases his claim on alleged retaliation, he similarly must show:

> (1) he or she engaged in statutorily protected activity, (2) he or she suffered an adverse employment action, and (3) there was a causal link between his or her activity and the other person's adverse action.

Currier v. Northland Servs., Inc., 182 Wn. App. 733, 742, 332 P.3d 1006 (2014); *see also, e.g.*, *Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 364, 287 P.3d 51 (2012) (similar).

As to both claims, plaintiff must also satisfy the *McDonnell-Douglas* burden-shifting test. *Short v. Battle Ground Sch. Dist.*, 169 Wn. App. 188, 204, 279 P.3d 902 (2012) ("We apply the same federal *McDonnell Douglas* burden-shifting scheme to retaliation claims that our

Supreme Court adopted . . . for state law discrimination claims."); *Milligan*, 110 Wn. App. at 638 (similar). Under this test, plaintiff first must establish his *prima facie* case. If he fails to do so, his claim should be dismissed. *Id.* If he does meet that burden, however, the employer then has the opportunity to articulate a lawful basis for its alleged actions. *Id.* Afterward, dismissal is again appropriate unless plaintiff can produce evidence that the employer's lawful basis was a pretext for retaliation or discrimination. *Id.*

Because these two claims involve overlapping elements, the County addresses them in conjunction, below. In assessing these claims, this Court should only consider the evidence available to the trial court at the summary judgment stage, and therefore should disregard plaintiff's citations to evidence presented at trial or other parts of the record outside summary judgment. *See, e.g.*, *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754-55, 162 P.3d 1153 (2007) ("It is our task to review a ruling on a motion for summary judgment based on the precise record considered by the trial court.").

In sum, plaintiff failed to offer sufficient evidence on summary judgment that King County subjected him to an adverse action; that his work was satisfactory at the time of any such action; that any such action was a result of improper animus; or that the County's legitimate

explanations were pretext for discrimination or retaliation. Each of these failures is independently sufficient to warrant affirmance on appeal.

1. Plaintiff Failed to Establish an Adverse Employment Action in Support of Either Claim

Plaintiff's failure to establish an adverse action required summary judgment on both his disparate treatment and retaliation claims. "An adverse employment action involves a change in employment that is more than an inconvenience or alteration of one's job responsibilities. It includes a demotion or adverse transfer, or a hostile work environment." *Boyd v. State*, 187 Wn. App. 1, 349 P.3d 864, 870 (2015). Even an undesirable reassignment or discipline does not constitute an adverse action, as a matter of law, if it did not result in "any loss in pay or benefits." *See Tyner v. State*, 137 Wn. App. 545, 565, 154 P.3d 920 (2007) (reassignment of plaintiff who made discrimination complaint was not an adverse action); *see also, e.g.*, *Donahue v. Cent. Wash. Univ.*, 140 Wn. App. 17, 26, 163 P.3d 801 (2007) (professor did not show adverse action in support of retaliation claim because "[h]e did not lose tenure, he was not demoted, and he did not receive a reduction in pay").

Plaintiff cites no case that supports the notion that he demonstrated an adverse action in opposition to summary judgment. He primarily relies upon *Boyd*, 187 Wn. App. 1, for the proposition that "[w]hether alleged

retaliatory acts are 'materially adverse' . . . is a question of fact for the jury." Pl.'s Br. at 15. But he ignores that the *Boyd* plaintiff was, among other disciplinary actions, suspended without pay. 187 Wn. App. at 14. By contrast, Marin suffered no discipline affecting his pay or benefits.

a. Plaintiff's Hostile Work Environment Theory Was Already Rejected by the Jury

Plaintiff primarily argues that he suffered an adverse action by relying on the trial court's finding that there was sufficient evidence to go to trial on his hostile work environment claim. Pl.'s Br. at 16-17. Plaintiff posits that a hostile work environment itself constitutes an adverse action, such that the trial court should have allowed *both* his claims for hostile work environment and disparate treatment to go forward. *Id.*

This theory makes no sense. It would have been duplicative and confusing to instruct the jury on both a hostile work environment claim and a disparate treatment claim based on the *very same* alleged hostile environment. A party is not entitled to go to trial on multiple theories based on the same allegations. *See Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 546, 871 P.2d 601 (1994) ("Three separate legal theories based upon one set of facts, constitute one claim for relief under CR 54(b). . . . [A] single claim for relief, on one set of facts, is not converted into multiple claims, by the assertion of various legal

theories."); *Kaech v. Lewis County Pub. Utility Dist. No. 1*, 106 Wn. App. 260, 261, 23 P.3d 529 (2001) ("a nuisance claim that is simply a restated negligence claim need not be considered separately from the negligence claim"). The trial court did not err by dismissing the disparate treatment claim while permitting the hostile work environment claim to go forward.

Moreover, when the jury found that plaintiff failed to prove a hostile work environment, RP 9/25/2014 at 96:9-99:6, it effectively foreclosed plaintiff's current attempt to conduct another trial on the same issue. The jury's finding is fatal to plaintiff's theory that he suffered an adverse action in the form of a hostile work environment. *See Bundrick v. Stewart*, 128 Wn. App. 11, 20, 114 P.3d 1204 (2005) (while summary judgment on battery claim had been improper, this Court did not reverse because the jury's later finding of informed consent was dispositive).

For this reason, the Court need not consider the merits of plaintiff's litany of complaints about alleged conflicts with various individuals on different crews, in connection with this claim. *See* Pl.'s Br. at 20-21 (listing, in summary fashion, seven allegations ostensibly contributing to a "hostile work environment"). Plaintiff only argues these events were "adverse" because they contributed to a hostile work environment.

Of course, each of plaintiff's listed allegations also lacks any basis in law or fact in the first place. If there had been substance to them,

plaintiff would have dedicated more than a few words to each one. For example, while he claims that he found "frightening racial materials at his desk," the exhibit he cites refers only to a Cracker Jack comic.[7] Pl.'s Br. at 20 (citing Trial Ex. 180). Marin actually admits that this comic was not placed on his desk, but rather in a section of the plant where he did not normally work. CP 4368. The County conducted an investigation and was unable to determine who placed the comic there or why. CP 4140-41; CP4177-81. When an unknown person left a Cracker Jack comic in a random part of the plant, it was not an adverse action as a matter of law. The same flaws affect each of the other conclusory allegations cited by plaintiff in support of this theory of an adverse action.

b. Plaintiff's Transfer to Renton Was Not "Adverse"

Plaintiff next claims that his transfer from West Point to Renton was "materially adverse." Pl.'s Br. at 18-19. That assertion is both factually and legally wrong. Plaintiff repeatedly requested the transfer to Renton, both through his counsel and his psychologist. CP 4330-32; CP 4515-20. The transfer was made permanent after Marin requested it as a medical accommodation, and Marin was happy to receive it. CP 4312,

[7] Marin has claimed the comic was cut with a knife, but does not deny that it may have come out of the box that way. *See* RP 9/17/2014 at 121:9-13.

4515-20, 4328-29. He preferred the South Plant because he had a "good supervisor" and "good coworkers," and it was a shorter commute than West Point. CP 4868-69. Indeed, several months after the permanent transfer, Marin reaffirmed that he would prefer to work on the South Plant B Crew over *any other station* in WTD. CP 4836-41. Contrary to plaintiff's arguments, there was nothing "adverse" about the transfer to Renton; it was a desirable transfer which Marin received at his request. In fact, had the County denied the requested transfer, plaintiff would now be arguing that the denial itself was an adverse action.

c. Plaintiff Did Not Suffer Discipline Rising to the Level of an Adverse Employment Action

Plaintiff appears to argue that he suffered disciplinary adverse actions on two occasions. *First*, he briefly asserts that he suffered a "materially adverse" action when he received a TLC that "threatened" discipline. Pl.'s Br. at 19. But it is undisputed that the TLC was not disciplinary, did not affect plaintiff's pay or duties, and only warned of discipline in the event of *future* infractions. CP 4218 ¶ 10. In any event, "threats" of discipline which do not affect the plaintiff's pay or position by definition cannot constitute adverse actions for purposes of a disparate treatment or retaliation claim. *See, e.g.*, *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004) ("threatening to fire an employee is not

an adverse employment action"); *Donahue*, 140 Wn. App. at 26 (no adverse action on retaliation claim where no demotion or pay cut).

Second, plaintiff makes the counter-factual assertion that he suffered "unwarranted discipline" at West Point "for going home sick." Pl.'s Br. at 20-21. But plaintiff bases this claim on a letter from King County *removing* a reprimand from his file. Pl.'s Br. at 20 (citing Trial Ex. 162). There was no evidence that the withdrawn reprimand impacted his pay or work duties (nor that it was motivated by his illness), which means that it was not adverse as a matter of law. *See, e.g.*, *Kirby*, 124 Wn. App. at 465 (only discipline that actually affects "workload or pay" qualifies as adverse action); *Cotterell v. Gilmore*, 64 F. Supp. 3d 406, 425 (E.D.N.Y. 2014) (no adverse action where discipline was not pursued).

d. Plaintiff Cannot Show Any Other Adverse Action

Finally, plaintiff summarily argues that he suffered an adverse action because he did not receive "required training," was denied a "walk through" with a "safety trainer," and did not receive "equipment specific written procedures." Pl.'s Br. at 19. It is unclear what evidence plaintiff relies upon, as he only cites generally to a 36-page expert report. Pl.'s Br. at 19. That report is irrelevant to whether Marin suffered an adverse action, because it purports to identify *generalized* deficiencies in WTD

(which, although not pertinent here, the County disputes)—not a specific adverse action directed at Marin. *See id.* (citing CP 1387-1423).

2. Plaintiff Failed to Prove that Any Adverse Action Was A Result of Discrimination

Not only is plaintiff unable to show an adverse action, he has not identified evidence that any such action was discriminatory. Plaintiff bears the burden to show "circumstances that raise a reasonable inference of unlawful discrimination" with respect to any adverse action. *Anica*, 120 Wn. App. at 488-89. Plaintiff's brief does not discuss this element of his claim. Pl.'s Br. at 20-21. His failure to address this issue amounts to an admission that his argument lacks merit. *See McNeair*, 88 Wn. App. at 340 (deeming the failure to make an argument to be "a concession that such an argument has no merit").

3. Plaintiff Failed to Prove that His Protected Conduct Was a Substantial Factor in Any Adverse Action

Likewise, plaintiff fails to show that his protected conduct, such as a discrimination complaint, was a "substantial factor" in any adverse action. Although plaintiff nominally discusses this topic in two sections of his brief, he never identifies a single person who allegedly chose to impose an adverse action *because of* protected conduct. Pl.'s Br. at 15-18.

Most importantly, plaintiff hinges his claim of "retaliatory animus" on comments made by his former West Point supervisor, Jim Sagnis. Pl.'s

Br. at 18. But, the evidence he cites is a reprimand in which King County *disciplined Sagnis* for making inappropriate comments about Marin on October 21, 2009. Pl.'s Br. at 18 (citing Trial Ex. 135). Sagnis had no contact with Marin at the time he made these statements or at *any time* after he learned that Marin had accused him of discrimination. Rather, immediately after Marin filed his discrimination complaint regarding Sagnis with Human Resources in June 2009, the County transferred Marin to a different plant in another city, at Marin's request. CP 4218-19, ¶¶ 16-19. Sagnis never worked with Marin again after that transfer. *Id.* ¶ 19 ("Following this transfer, Mr. Marin never worked on a crew with James Sagnis or Mark Horton again."). Thus, even if Sagnis harbored retaliatory animus at the time of his October 21, 2009 statements, it would be irrelevant to Marin's claims.

Finally, plaintiff argues that, after Sagnis' comments, Marin "could not be returned to the [West Point] Plant he had known for over 20 years." Pl.'s Br. at 18. That is a mischaracterization of the evidence. When the County reprimanded Sagnis, it did not remove Marin from West Point. Rather, it removed him from the D Crew at West Point, while giving ***Marin*** final say over whether to eventually return. That is confirmed by the fact that the County actually attempted to return Marin to West Point

in March 2010. CP 4257-58. Marin did not want to return, however, so he requested and was granted a permanent transfer to Renton instead. *Id.*

4. Plaintiff Failed to Prove that His Work Was Satisfactory

Plaintiff ignores another element of his disparate treatment claim: he fails to show, or even argue, that his work was satisfactory at the time of any alleged adverse action. *See, e.g.*, *Campbell v. Obayashi Corp.*, 424 Fed. Appx. 657, 658 (9th Cir. 2011) (affirming summary judgment for defendant on WLAD claim, in-part "because [plaintiff] failed to raise a genuine issue of material fact as to whether he was performing satisfactory work"). The evidence in fact shows that Marin's performance was not satisfactory. For example, before Marin received a non-disciplinary TLC, he admitted to his supervisor that he had committed a "lockout" error. *See, e.g.*, CP 4603 ¶ 11. Further, plaintiff's coworkers on the C Crew asked him to job shadow them for a time, rather than working with hazardous equipment, only after he made a mistake that almost caused a chemical spill. CP 5906-07. Plaintiff's failure to satisfy his burden as to this element independently warrants affirmance of summary judgment.

5. Plaintiff Failed to Establish That the County's Explanation for Its Conduct Was a Pretext

Finally, plaintiff cannot show that the County's legitimate reasons for its conduct were pretext. *See, e.g.*, *Kirby*, 124 Wn. App. at 468-69

(affirming summary judgment where plaintiff's only evidence of pretext was his belief that he was discriminated against). Every action of which Marin complains had a lawful basis. When Sagnis gave Marin a documented oral reprimand in May 2009 (which was later withdrawn), it was because Sagnis believed Marin had refused to follow a priority directive. CP 1335-36 (copy of the reprimand filed by plaintiff on summary judgment). When Read helped Marin join her crew at Renton, his own testimony is that she was being "very kind" and "compassionate." CP 4318-19. When the County made that transfer permanent, it did so to satisfy Marin's request. CP 4219-20, 4257-58. When Read later gave Marin the TLC, it was because he admitted to Read that he had committed a "lockout" error. CP 4603 ¶ 11. And when coworkers on C Crew asked Marin to refrain from working on hazardous equipment while he was being trained at the South Plant, it was because he committed an error that almost caused a chemical leak. CP 5906-07.

There is no evidence these events were motivated by plaintiff's protected class or conduct. Plaintiff's attempts to show pretext are meritless. First, he claims that the TLC "was different from treatment of other employees with history of 'unsafe' acts or lockout tagout violations." Pl.'s Br. at 19. He points to Billy Burton as someone who committed a "lockout" error "without getting a 'TLC' or threats of

discipline." *Id.* at 19-20. But plaintiff's cited evidence actually shows Burton did receive a TLC. *Id.* at 20 (citing CP 1503-04). Plaintiff further omits that other WTD employees received actual discipline—not just a TLC or "threats" of discipline—for lockout errors. CP 1508-09 ¶ 25.[8]

Second, plaintiff provides a laundry list of unrelated allegations in support of his claim of pretext. He does not tie those allegations to any adverse action, however, and no such connection exists. Pl.'s Br. at 21. For example, he cites the declaration of Norm Cook, a former employee who stopped working for King County in 2003—five years before the limitations period began. *See* CP 1424-34. By virtue of Cook's departure in 2003, none of his testimony purports to relate to Marin's experiences from 2008 through 2011, making it irrelevant to whether the County's explanations for its actions during the limitations period were pretext.

* * * *

In light of plaintiff's failure to show that he suffered a specific adverse action because of his protected class or protected conduct, while performing satisfactory work, and that the County's legitimate reasons for

[8] Plaintiff also does not dispute that Burton worked for a different supervisor, which means he would not be a valid comparator in any event. *See, e.g.*, *Xuan Huynh v. U.S. Dep't of Transp.*, 794 F.3d 952, 960 (8th Cir. 2015) (employees were "not valid comparators [with the plaintiff] because they had different . . . supervisors"); *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 21 (1st Cir. 1999) (similar).

that specific action were pretext, the trial court correctly dismissed his disparate treatment and retaliation claims on summary judgment.

D. The Court Properly Exercised its Discretion to Exclude Inadmissible Evidence: Assignments 4 and 6

"The standard of review for evidentiary rulings made by the trial court is abuse of discretion." *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). Although plaintiff points to a lesser standard of review in the summary judgment context, the evidentiary rulings he challenges were made in connection with trial. *See* Pl.'s Br. at 27-30.

1. The Trial Court Properly Required a Foundation Prior to Allegations of "Retaliation": Assignment 6

Prior to trial, Marin's deposition reflected that he was accusing numerous people of "retaliation" without any supporting foundation. Many of these allegations were also based on Marin's belief that people retaliated against him for making complaints about issues unrelated to discrimination, such as a complaint about a coworker who made a mess. *See* CP 5014-19; CP 5024-27; CP 6229-30; CP 6238-51. Under the WLAD, however, retaliation is only actionable if it is based on complaints about discrimination. *Alonso v. Qwest Commc'ns. Co.*, 178 Wn. App. 734, 754, 315 P.3d 610 (2013) ("A general complaint about an employer's unfair conduct does not rise to the level of protected activity . . . under WLAD absent some reference to the plaintiff's protected status."); *Graves*

v. Dep't of Game, 76 Wn. App. 705, 712, 887 P.2d 424 (1994) (complaint that did not allege "discrimination" was not protected under the WLAD).

As a result, the trial court granted an order requiring plaintiff to lay a foundation that a coworker or supervisor was aware that Marin had complained about discrimination before plaintiff accused that individual of retaliation in front of the jury. CP 2963-64. This order was consistent with how federal courts handle similar cases where a plaintiff is accusing numerous different people of retaliation or discrimination without foundation. *See, e.g.*, *Graves v. Dist. of Columbia*, 850 F. Supp. 2d 6, 14 (D.D.C. 2011) (requiring plaintiff to "make an offer of proof demonstrating . . . a factual basis for the trier of fact to infer that the incident was . . . motivated by a discriminatory animus"); *Johnson v. Watkins*, No. 3:07CV621 DPJ-JCS, 2010 WL 2671993, at *5 (S.D. Miss. June 30, 2010) (requiring plaintiff to lay "a foundation that the alleged retaliator was aware of her complaint").

In his brief, Marin's only argument regarding this order is that it restricted him to using direct, as opposed to circumstantial, evidence. Pl.'s Br. at 30. But the express terms of the order make clear that is not true. *See* CP 2963-64. The order required plaintiff to lay a foundation that the individuals whom plaintiff accused of retaliation knew that he had complained about discrimination—but it did not restrict the types of

evidence that Marin could use to make that showing. *Id.* As a result, plaintiff's only argument for finding error is belied by the record.

2. The Trial Court Properly Limited the Testimony of Lloyd Holman: Assignment 4

Plaintiff objects that the trial court struck the testimony of Lloyd Holman. Pl.'s Br. at 28-29. This ruling was narrow: the court only struck the portion of Holman's testimony "regarding statements in the plant as to knowledge of complaints made by Mr. Marin regarding Alenduff." RP 9/25/2014 at 7:11-17. The extent of Mr. Holman's testimony on that topic was only that he had *heard* a statement that "part of the basis for Mr. Alenduff's termination was a complaint" made by Marin. RP 9/17/2014 at 32:22-33:9. Holman's testimony did not reflect any knowledge about whether the complaint related to discrimination. *See id.* He admitted that he could not remember who made that comment or when it was made. RP 9/17/2014 at 33:15-25. This comment might well have been made years after plaintiff retired. And Marin has not accused Holman of harassing him or taking adverse action against him.[9] As a result, Holman's testimony was both irrelevant and hearsay. ER 401; ER 702. Indeed, the trial court originally let this testimony into evidence only on the premise

[9] Plaintiff also laid no foundation regarding Holman's role in WTD, whether he worked with Marin, whether he was part of management, nor any other reason why Holman's testimony could have had even theoretical relevance.

that plaintiff would "tie up" its relevance later in the case, RP 9/17/2014 at 31:16-32:18, which he never did.

Plaintiff's claim that this anonymous out-of-court statement was relevant to show "widespread knowledge in WTD . . . of Marin's WLAD protected activity" is meritless. *See* Pl.'s Br. at 28. Holman's testimony was not probative of whether any of Marin's alleged harassers knew that Marin had made a complaint against Alenduff at the time when they allegedly harassed him. Nor was the comment probative of whether anyone believed the complaint related to allegations of discrimination, such that it would have been protected by the WLAD. *See Alonso*, 178 Wn. App. at 754. The trial court properly struck this irrelevant hearsay.

E. Plaintiff's Objections to the Inclusion of Juror 71 and Related Allotment of Time are Meritless: Assignments 7, 9, and 10

1. All of Plaintiff's Belated Objections Regarding Juror Gilbert Are Irrelevant, in Light of the Unanimous Verdict

The jury rendered a 12-0 verdict for King County. RP 9/25/2014 at 96:9-99:6. Under Washington law, however, the County could have prevailed with only *ten* votes. RCW 4.44.380. As a result, plaintiff's arguments regarding the inclusion of Mr. Gilbert (a.k.a. Juror No. 71) on the jury are irrelevant: even if he had been stricken and his replacement had voted for a plaintiff's verdict, the judgment still would have been for King County. The inclusion of Mr. Gilbert on the jury therefore could not

have been reversible error. *See Portch v. Sommerville*, 113 Wn. App. 807, 812, 55 P.3d 661 (2002) ("Replacing one juror would not have affected the overall result since a unanimous jury is not required. . . .").

2. Plaintiff Waived His Cause Challenge by Not Raising it During Voir Dire

Plaintiff did not ask Mr. Gilbert a single question or attempt to strike him from the jury during voir dire. *See* RP 9/4/2014 at 101:14-15 ("this particular juror had his card raised for a long time and was not called upon"); RP 9/3/2014 at 165-68 (reflecting peremptory challenges). Because plaintiff accepted Juror Gilbert, he "cannot later challenge that juror's inclusion." *Dean v. Grp. Health Co-op. of Puget Sound*, 62 Wn. App. 829, 836, 816 P.2d 757 (1991). In *Dean*, this Court held that the plaintiff waived his ability to challenge two jurors by failing to assert the challenge during voir dire. *Id.* The same result is required here.

There is only one exception to the foregoing rule: where a juror's misconduct prevents a party from learning of his bias. *See In re Detention of Broten*, 130 Wn. App. 326, 338, 122 P.3d 942 (2005). That exception is inapplicable in this case. Juror Gilbert disclosed his relationship with a County employee in writing on his supplemental juror questionnaire prior to voir dire. CP 6554-55 (disclosing he was a "good friend with a King County prosecutor"). Juror Gilbert also tried to raise the issue before the

panel was sworn, but plaintiff chose not to question him at that time. *See* RP 9/3/2014 at 168:6-18 (cited in Pl.'s Br. at 32). Absent juror misconduct, there was no basis for excluding Mr. Gilbert from the jury.

3. The Court Gave Plaintiff *Extra* Time for Questioning, Not Less Time, Contrary to Plaintiff's Contention

Plaintiff argues that the trial court improperly denied him additional time to question Gilbert. To the contrary, plaintiff used all of his allotted time for questioning during voir dire, and exercised all his challenges, without requesting additional time. *See* RP 9/3/2014 at 165-68 (record of plaintiff's challenges). The only part of the record cited by plaintiff for the proposition that he asked for more time is a statement made by his counsel *after* voir dire, in which she asserted that she previously had made such a request. Pl.'s Br. at 32. The court disagreed with that assertion, RP 9/4/2014 at 102:14-18, and plaintiff has identified no such request on the record prior to the end of voir dire, which confirms the court's view (and that of King County) that no such request was made.

Thus, only *after* the jury was impaneled did plaintiff ask for time to question Gilbert. Although not obligated to do so, the court granted that request, but made clear that it would count the time used to question Gilbert against each party. RP 9/4/2014 at 104:6-14. There was nothing unfair about the court's time restriction. Plaintiff's assertion that "the

sanction of reducing trial time was one sided," Pl.'s Br. at 34, is belied by the court's ruling. RP 9/4/2014 104:6-14 ("Well, I was going to inform all of you that from now on all of the time counts in your time, so if you wish to use time to question him, I will bring him out.") (emphasis added). Plaintiff did not object to the court's decision to allocate time in this manner, *id.*, and that decision was within its discretion to manage the trial.

Based on this record, the principle case cited by plaintiff, *State v. Brady*, 116 Wn. App. 143, 64 P.3d 1258 (2003), is inapposite. There, the trial court established an amount of time for voir dire, but reduced the allotted time *before* the parties completed their questioning or exercised challenges. The parties objected and, on review, this Court held that the decision to "change[] the rules" was error. *Id.* at 146-49. By contrast, in this case, the trial court did not change the rules, and plaintiff did not object. Moreover, *Brady* supports the County's position because the Court held that a limit on questioning a single juror was harmless. *Id.* at 148.

4. Plaintiff Failed to Establish Grounds for Cause

Plaintiff never directly argues that the trial court erred by denying his belated cause challenge, and does not address the elements of such a challenge. Pl.'s Br. at 31-37. He does argue, however, that the court should have dismissed Juror Gilbert at the conclusion of trial anyway. *Id.* at 35-37. Plaintiff cites no authority supporting such a counter-intuitive

notion, waiving this assignment of error. *Supra* III.A. And in any event, plaintiff did not establish grounds for cause: he did not ask a single question establishing that Juror Gilbert could not be impartial, RP 9/4/2014 at 105:4-106:1, which means there was no basis to exclude him from the jury, RCW 4.44.170(2).[10]

F. The Court Properly Admitted Dr. McClung's Testimony: Assignment 16

1. Dr. McClung's Testimony Was Admissible to Rebut Plaintiff's Evidence and Disprove His Claims

The nature of plaintiff's medical conditions, whether they could reasonably be accommodated, and whether Marin could perform the essential functions of his position were central to his accommodation claim. *See, e.g., Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 373, 112 P.3d 66 (2005) (listing elements for an accommodation claim). Plaintiff offered testimony from his doctor and psychologist on these and other topics. For example, plaintiff's providers testified that they wrote letters to King County requesting accommodations for PTSD. RP 9/11/2014 at 23:7-27:10; 29:19-30:4; 35:11-18. They endorsed plaintiff's

[10] Plaintiff also tries to make hay from the fact that defense counsel represented the County as outside counsel appointed as special deputy prosecuting attorneys. Pl.'s Br. at 33 n.5. But the record does not reflect that counsel's relationship with the prosecutor's office was stated in front of the jury. The jury had no reason to believe that employees of the prosecutor's office were responsible for defending the case, because they were not.

belief that his conditions, including PTSD, flared due to stress at work. RP 9/10/2014 at 139:13-140:3; 142:20-25; RP 9/11/2014 at 21:3-9. Plaintiff also asked them to go beyond the scope of medical testimony, opining directly on his character. *Id.* at 8:25-9:5 ("He's very earnest, very responsible, very courteous, very hard-working, very genuine.").

Plaintiff's challenge to the admissibility of Dr. McClung's opinions is an attempt to hamstring the County's defense and insulate his witnesses from rebuttal. Dr. McClung's testimony was admissible both on the merits of plaintiff's claims and to rebut plaintiff's providers.[11] For example, Dr. McClung rejected the claim that Marin suffered from PTSD, diagnosing him instead with adjustment disorder, somatic disorder, and paranoid personality traits. RP 9/24/2014 at 39:15-43:2. He refuted plaintiff's providers' recommendations for accommodations, explaining why their proposals were unreasonable. *Id.* at 46:13-49:5. And he explained that Marin's conditions interfered with his ability to receive supervisory correction, which was an essential function of his job. *Id.*

[11]Even if the trial court had erred in admitting some portion of this testimony, which it did not, the prior admission of plaintiff's medical providers' testimony on the same topics would preclude reversal. "Admission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection." *Miller v. Kenny*, 180 Wn. App. 772, 793, 325 P.3d 278 (2014) (quotation omitted).

Plaintiff grounds his assignment of error on mischaracterizations of Dr. McClung's testimony. For example, he claims that Dr. McClung did not diagnose Marin with a "paranoia related mental illness." Pl.'s Br. at 57. That is not true. Dr. McClung testified, without objection, that he diagnosed Marin with "adjustment disorder with paranoid personality traits." RP 9/24/2014 at 66:5-9. Next, plaintiff goes even further by claiming that Dr. McClung "concurred that [Marin] had the disability which Marin's doctors sought accommodation for." Pl.'s Br. at 58. In reality, Dr. McClung testified at length that Marin did *not* suffer from PTSD. RP 9/24/2014 at 40:8-42:12. Similar inaccuracies infect the remainder of plaintiff's unsupported arguments.

2. Dr. McClung's Testimony Properly Reflects on Marin's Conditions and Symptoms, Not His Character

Plaintiff argues that Dr. McClung's diagnosis of paranoid personality traits was inadmissible character evidence. Pl.'s Br. at 55-57. This Court has rejected this line of reasoning, holding that "[p]rior mental history is not excluded by ER 404 precisely because it is not character evidence, but rather, evidence of behavior." *In re Meistrell*, 47 Wn. App. 100, 109, 733 P.2d 1004 (1987); *see also, e.g.*, *Rivera v. Apfel*, No. 98 C 2682, 2000 WL 150761, at *8 (N.D. Ill. Feb. 7, 2000) (approving reliance on expert testimony that plaintiff's perceptions of medical issues were

inconsistent with "objective medical evidence"). Moreover, contrary to plaintiff's characterization of the record, Dr. McClung did not attack Marin's character or assert on direct that Marin was not credible. The trial court foreclosed such evidence and cautiously instructed the jury to disregard any testimony that even came close to the line. RP 9/23/2014 at 215:9-17; RP 9/24/2014 at 38:23-39:7. The court's instructions are an independent reason for rejecting plaintiff's meritless assignment of error. *See, e.g.*, *State v. Perez-Valdez*, 172 Wn.2d 808, 817-19, 265 P.3d 853 (2011) (improper opinion that "[the victims] are telling me the truth" was cured by instruction to disregard the statement).

Further, to the extent Dr. McClung eventually did address the accuracy of Marin's perceptions, it was after *plaintiff* elicited such testimony on cross. Plaintiff's counsel asked Dr. McClung to testify that Marin's perceptions were accurate, or in their words, "spot on." *E.g.*, RP 9/24/2014 at 56:2-5. Only after cross did defense counsel seek to clarify that many of Marin's perceptions were not, in fact, "spot-on"—a fact which also contributed to Dr. McClung's diagnosis. *See* RP 9/24/2014 at 59:17-61:15. Plaintiff cannot be heard to complain about this testimony, when he was the one who opened the door. *See United States v. Sine*, 493 F.3d 1021, 1037 (9th Cir. 2007) (the open door rule allows "evidence on the same issue to rebut any false impression") (quotation omitted).

3. Plaintiff Waived Any ER 702 Objection

Plaintiff briefly argues that Dr. McClung's diagnosis of paranoid personality traits should not have been admitted because it ostensibly was not a "recognized" diagnosis. Pl.'s Br. at 56. Although not titled as such, this is really a motion to exclude Dr. McClung's opinions under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and ER 702. *See Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011) (discussing test for admissibility of expert opinions under *Frye* and ER 702). Plaintiff not only fails to satisfy (or argue) the elements of *Frye*, he did not include that objection among the various objections he raised when Dr. McClung offered his diagnosis. RP 9/24/2014 at 42:13-45:1; 66:5-9. As such, plaintiff did not preserve this alleged error for review. *See Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 356, 333 P.3d 388 (2014) (declining to consider *Frye* challenge where it was not preserved).[12]

[12] Plaintiff also makes the conclusory assertion that he was "denied a 'thorough sifting' cross examination of Dr. McClung, limited by the Court to 15 minutes. . . ." Pl.'s Br. at 58. Plaintiff omits that the court allotted equal time to each side for purposes of completing the trial by a deadline, without objection. RP 9/11/2014 at 101:13-103:18; *see also* RP 9/23/2014 at 70:17-18 (plaintiff's counsel: "the Court said that the parties had equal time and I accepted that"). Plaintiff used all but 14 minutes of his time before King County called Dr. McClung as a witness. RP 9/23/2014 at 216:1-6. The trial court therefore allowed him to question Dr. McClung for 15 minutes. *Id.* This Court should reject plaintiff's conclusory argument that this allotment of time was improper.

G. Marin's Objections to Supposed Discovery "Violations" Are Meritless, and Were Waived: Assignments 13-14

In a short, two-page section of his brief, plaintiff addresses three arguments regarding alleged discovery violations. Plaintiff's cursory discussion of these issues is inadequate for review, waiving assignments of error 13 and 14. These objections are also wrong on the merits.

First, plaintiff summarily argues that the trial court improperly denied his motion "about County discovery abuse and spoliation." Pl.'s Br. at 44-45. Although he cites two orders that he believes were in error, he does not explain (and the County cannot ascertain) why he contends they were deficient, waiving his assignment of error. *Supra* III.A.

Second, the County offered at trial two ER 1006 summaries of data generated by the WTD electronic time-keeping system. *See* Trial Exs. 618A-619A; RP 9/18/2014 at 208:12-213:3. The data underlying those summaries was produced to plaintiff before trial, as soon as the County discovered it, belying plaintiff's only argument against its admissibility. *See* RP 9/18/2014 at 212:20-213:3. Moreover, even if there had been error, there would be no prejudice: the ER 1006 summaries merely reflected how Marin's time was recorded at the South Plant, which was not a central issue on either of Marin's claims. *See Colley v. Peacehealth*, 177 Wn. App. 717, 727, 312 P.3d 989 (2013) (error in permitting use of

inadmissible document did not require reversal because it related to an issue on which "plaintiff's case did not depend").

Finally, plaintiff objects to Trial Exhibits 458, 629, and 630. Pl.'s Br. at 44. The basis for his objection is unclear. Although he claims that "the County produced new 'emails' and 'logs' during testimony of Marin's witnesses," Exhibit 458 was produced during discovery and is bates stamped as such. Trial Ex. 458 (stamped KC0016092). Meanwhile, Exhibits 629 and 630, which were not subject to the discovery cited by plaintiff, were also never shown to the jury. The County did not introduce either exhibit into evidence. RP 9/9/2014 at 43:24-44:1, 104:1-4.

Plaintiff also waived his demand for sanctions as to these exhibits. After plaintiff requested sanctions in an oral motion, the County pointed out that these documents were not within the scope of plaintiff's discovery. RP 9/9/2014 at 58:22-59:20. The trial court reserved ruling and instructed plaintiff to file a written motion. RP 9/9/2014 at 59:21-60:9. Plaintiff never filed that motion, and thus did not preserve this assignment. *State v. Englund*, 186 Wn. App. 444, 455-56, 345 P.3d 859 (2015) (affirming decision not to grant relief requested in oral motion, due to non-compliance with the court's instruction to file a written motion).

H. The Court Correctly Directed a Verdict on the Retaliation Aspect of the Hostile Work Environment Claim: Assignment 2

The trial court permitted plaintiff's hostile work environment claim to be decided by the jury. First, however, the court granted King County's directed verdict motion in-part, limiting the basis for that claim to alleged discrimination and dismissing the "retaliation" component of the claim. CP 6575-76. The trial court's decision should be affirmed.

1. Standard to Prove a Retaliatory Hostile Work Environment

The WLAD prohibits retaliation based on protected conduct. Washington courts have defined the scope of such conduct narrowly: the making of complaints is only "protected" if the employee explicitly complains about *discrimination* based on protected class. *See Alonso*, 178 Wn. App. at 754 (a complaint "does not rise to the level of protected activity . . . absent some reference to the plaintiff's protected status.").

When a plaintiff grounds a hostile work environment claim on allegations of retaliation, as opposed to discrimination, the plaintiff still must prove the traditional elements of a hostile work environment. Thus, plaintiff bears the burden to prove that he experienced "severe or pervasive harassment in retaliation for engaging in protected activity." *Noviello v. City of Boston*, 398 F.3d 76, 92 (1st Cir. 2005). "It is only those actions, directed at a complainant, *that stem from a retaliatory*

animus which may be factored into the hostile work environment calculus." *Id.* at 93 (emphasis added). Where an alleged harasser is unaware of the plaintiff's protected conduct, their actions cannot form the basis for a retaliatory hostile work environment as a matter of law:

> [T]here must be, at a minimum, . . . competent evidence that the alleged retaliators *knew* of the plaintiff's protected activity and that a retaliatory motive played a part in the adverse employment actions. . . . The reasons underlying such a requirement are obvious: if a supervisor or other employee is unaware of the fact that a plaintiff engaged in protected conduct, any actions attributable to him could not plausibly have been induced by retaliatory motives.

Alvarado v. Donahoe, 687 F.3d 453, 459-60 (1st Cir. 2012) (quotations and citations omitted; emphasis in original).[13]

Before the trial court, plaintiff argued that he did not need to show that his harassers knew he engaged in protected conduct or that they harassed him for that reason. In support of that notion, he asked the court to adopt the "imputed knowledge theory," under which some courts have imputed knowledge of protected conduct to any manager within an organization with the authority to impose an adverse employment action, in the context of a stand-alone retaliation claim. *See Jones v. Bernanke*, 557 F.3d 670, 679 (D.C.

[13] The protected conduct must also be close in time to the alleged harassment. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862, 991 P.2d 1182 (2000) (no retaliation where "no proximity in time suggesting a nexus" between complaint and adverse action).

Cir. 2009). Other U.S. Courts of Appeals have rejected this concept. *See, e.g.*, *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 800 (11th Cir. 2000) ("[W]e [are] not . . . persuaded to adopt [plaintiff's] imputed knowledge theory. . . . Because [the supervisor] did not know of the protected conduct, he could not have taken that action on the corporation's behalf because of the protected conduct."). But this Court need not take sides in this circuit split, because it only arises in the context of a retaliation claim based on an adverse action. The County has not found any case applying this theory to a *hostile work environment* claim.

Applying the "imputed knowledge theory" to a hostile work environment claim would produce absurd results. In a retaliation claim, the plaintiff only needs to show that "the employer" knew of his protected activity, because *any* "adverse action" is imputed to the employer. *See Graves v. Dep't of Game*, 76 Wn. App. at 712. By contrast, in the context of a hostile work environment claim, the plaintiff must separately demonstrate that specific individuals harassed him based on his protected class or conduct, *and* that their harassment should be imputed to the employer. *See Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). If Plaintiff could establish that *all*

conduct of *all* individuals in the County was retaliatory merely because someone in management knew that he had engaged in protected conduct, it would eviscerate his burden under *Glasgow*. Indeed, under plaintiff's theory, once an employee lodges a complaint of any kind, *any* offensive conduct by *anyone* who works for the same employer would become "retaliation," even if they did not know about the complaint. That is not the law.

2. Plaintiff Laid No Foundation for Retaliatory Animus

The trial court dismissed the retaliation component of plaintiff's claim because he did not lay a sufficient foundation. After reviewing all the evidence at trial, the court found that plaintiff did not put on any evidence to show that a single alleged harasser knew, at the time of the harassment, that plaintiff had engaged in protected conduct. CP 6575-76.

The evidence at trial showed that the County was careful to avoid unnecessary disclosure of Marin's discrimination complaints, and to prevent the individuals against whom he made complaints of having further contact with him. For example, Marin first complained about discrimination on the D Crew at West Point on June 19, 2009. RP 9/10/2014 at 17:1-21. The County transferred him to the South Plant, at his request, immediately after the complaint. Trial Exs. 89, 467; RP 9/9/2014 at 179:23-181:9 (explaining that Marin never returned to West

Point after June 2009). Thus, by the time Marin's former West Point coworkers knew he had made a discrimination complaint, their interactions with him already had ended. For this reason, when Marin's former West Point supervisor, Jim Sagnis, made inappropriate comments (for which he was reprimanded) outside Marin's presence in October 2009—of which plaintiff was completely unaware prior to discovery in this lawsuit—those comments did not constitute "harassment" of Marin for purposes of a hostile work environment claim. *See, e.g.*, *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 794 (8th Cir. 2004) ("plaintiff cannot recover for harassment of which he or she is unaware"); *Mason v. S. Ill. Univ.*, 233 F.3d 1036, 1046 (7th Cir. 2000) ("Mean-spirited or derogatory behavior of which a plaintiff is unaware, and thus never experiences, is not 'harassment' of the plaintiff (severe, pervasive, or other).").

Further, when Marin transferred to the South Plant, the County did not tell his new coworkers that he had alleged discrimination at West Point. *See, e.g.*, RP 9/18/2014 at 27:4-24; RP 9/22/2014 at 102:21-104:22. And when Marin later accused his C Crew supervisor, Jim Alenduff, of looking at pornography (leading to Alenduff's termination), the County respected his request not to attach his name to a complaint. RP 9/9/2014 at 169:2-170:1. Plaintiff offered no evidence that any harasser knew he had made a discrimination complaint before they allegedly harassed him.

Even now, plaintiff does not identify a single person who learned of his complaints about discrimination *before* allegedly harassing him. Instead, plaintiff implicitly admits the accuracy of the trial court's finding by claiming only that there was "widespread notice of protected WLAD activity." Pl.'s Br. at 23. He then gives a list of fifteen bullet points which are all designed to obfuscate this simple fact: the record does not reflect anyone who harassed Marin *after* learning he engaged in protected conduct. *Id.* at 23-26. Without such a foundation, none of Marin's alleged harassers could have conceivably harbored retaliatory animus.

Plaintiff's bullets ultimately are irrelevant to this issue. Many of the "complaints" he relies upon were not "protected" under the WLAD because they did not allege discrimination. *See, e.g.*, Pl.'s Br. at 23, ¶ 1; *Alonso*, 178 Wn. App. at 754 (complaint was not protected "absent some reference to the plaintiff's protected status"). For example, Marin's original complaints in the limitations period only alleged unspecified harassment and did not refer to his protected class. RP 9/9/2014 at 113:23-114:2 (original complaint made "unspecified allegations"); *id.* at 120:14-121:18 (similar with respect to union grievance).

Plaintiff also describes the cited evidence in an inaccurate manner. For instance, he claims that "Mike Fischer . . . knew of Marin's allegations of a [hostile environment] on 'D Crew' at [West Point]." Pl.'s

Br. at 24. That allegation is irrelevant because plaintiff does not allege that Fischer ever harassed him. But even more fundamentally, Fischer actually *denied* having such knowledge in the testimony cited by plaintiff. RP 9/16/2014 at 71:17-73:25 (". . . I didn't know that at the time.").[14]

In sum, plaintiff did not introduce evidence that anyone at King County harassed him because he engaged in protected conduct. This Court should affirm the trial court's partial directed verdict.

I. Plaintiff's Asserted Errors are Harmless for the Additional Reason that He Failed to Establish a Prima Facie Case at Trial

The trial court was extremely cautious in submitting plaintiff's claims to the jury. The fact is that the evidence plaintiff offered at trial was so deficient that no reasonable jury could have rendered a verdict for plaintiff on either of his claims. As a result, any asserted error at trial would be harmless. *See Atwood v. Pac. Maritime Ass'n*, 657 F.2d 1055, 1058 (9th Cir. 1981) (erroneous denial of jury trial was harmless because "no reasonable jury could properly find a verdict for the [appellants]"); *State v. Kidd*, 57 Wn. App. 95, 101, 786 P.2d 847 (1990) (error in jury instruction was harmless where "no reasonable jury could have found" for

[14] As another example, plaintiff implies that County employees knew he was scheduled to engage in mediation—but he cites no evidence of such knowledge. Pl.'s Br. at 26, ¶ 14.

appellant). This includes the trial court's evidentiary rulings, order granting a directed verdict in-part, and composition of the jury.

1. Plaintiff Failed to Prove a Hostile Work Environment

Plaintiff failed to introduce sufficient evidence to establish the elements of a hostile work environment, including that he experienced harassment *because of* his protected class that affected *the terms and conditions* of his employment. *See Davis v. Fred's*, 171 Wn. App. at 359.

a. Plaintiff Has Not Shown Harassment Based on His Protected Class or Protected Conduct

Plaintiff did not establish that he experienced harassment because of his protected class or conduct. To meet this burden, he must do more than offer an opinion he was singled out—this claim requires evidence he was singled out because of his protected status. *See Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 85, 98 P.3d 1222 (2004) (plaintiff's belief that harassment was based on protected class was "not enough to survive summary judgment"); *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 161, 991 P.2d 674 (2000) (plaintiff "must prove that she would not have been singled out . . . had she been male").

Plaintiff's own witnesses testified that he was not the subject of discrimination. Indeed, although Marin made his final supervisor, Cheryl Read, a central focus of his case, he admitted he does not know whether

she discriminated against him. RP 9/17/2014 at 91:24-92:13. Witnesses also testified that Mark Horton, the focus of Marin's allegations at West Point, had conflicts with everyone on the crew, regardless of race. *See, e.g.*, RP 9/17/2014 21:10-24 (Horton was an "equal-opportunity jerk"); RP 9/8/2014 at 129:18-20 (crew member never saw Horton treat Marin differently); RP 9/18/2014 at 86:21-87:7 (there was "general" tension between Horton and the crew). Plaintiff did not offer sufficient contrary evidence that he experienced harassment because of his protected status.

b. Plaintiff Has Not Shown the Terms and Conditions of His Employment Were "Objectively" Altered

Plaintiff likewise did not show that discriminatory harassment altered the "terms or conditions" of his employment. To satisfy this element, he must establish that his workplace was ***both*** subjectively and objectively abusive. *Davis v. Fred's Appliance*, 171 Wn. App. at 362. Washington law is clear that "offensive" comments, such as jokes about an accent, fail this test. *See id.* at 362; *Manatt v. Bank of Am., NA*, 339 F.3d 792, 795-798 (9th Cir. 2003) (where coworkers made fun of accent and appearance, it did not alter the terms or conditions of employment). In assessing the severity of conduct, the Court must "look at whether [it] . . . included physical intimidation or humiliation. . . ." *Adams v. Able Bldg. Supply*, 114 Wn. App. 291, 297, 57 P.3d 280 (2002). Even "highly

offensive" comments are insufficient unless they are "pervasive." *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2001).

In addressing this question, the Court must disregard alleged harassment that plaintiff has not shown to be based on his protected status or he did not personally experience. *Adams*, 114 Wn. App. at 297-98 ("For facts demonstrating a hostile environment to be material . . . the employee must also demonstrate that the conduct complained of was discriminatory. . . ."); *Mason,* 233 F.3d at 1046 ("Mean-spirited or derogatory behavior of which a plaintiff is unaware, and thus never experiences, is not 'harassment' of the plaintiff . . . .").

Plaintiff's own witnesses demonstrated that he did not experience "severe and pervasive" harassment. For example, his psychologist admitted his work environment was not hostile during the majority of his time at the South Plant. RP 9/11/2014 at 74:8-75:20, 131:10-13. Marin also sent the County a letter acknowledging that "[h]is boss and coworkers have, for the most part, been very supportive[,] encouraging and helpful." RP 9/23/2014 at 146:1-12. Given such evidence, no jury could reasonably have found that plaintiff proved harassment that was so *objectively* "severe and pervasive" as to alter the terms and conditions of his employment.

2. Plaintiff Failed to Prove His Accommodation Claim

Plaintiff did not establish the elements of a claim for failure to reasonably accommodate a disability, including that he was capable of performing the essential functions of his job, that King County failed to offer or provide reasonable accommodations, or that plaintiff satisfied his own duty to engage in the interactive process. *See, e.g.*, *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003).

a. Plaintiff Could Not Perform the Essential Functions of His Position as a Wastewater Treatment Operator

"Washington law is well settled that to prove a claim for failure to accommodate, a plaintiff must demonstrate that he or she can perform the essential functions of the job as determined and applied by the employer . . . ." *Fey v. State*, 174 Wn. App. 435, 444, 300 P.3d 435 (2013). Plaintiff offered no such proof at trial. To the contrary, both Marin and his psychologist opined that he was unable to perform ***any*** job in sewage treatment, due to his conditions. RP 9/11/2014 at 50:2-51:6; RP 9/17/2014 at 75:10-20. Moreover, the evidence showed that Marin's conditions flared in stressful situations. Trial Ex. 173, at 4. That aspect of his conditions is important because operators like Marin are required to "[r]espond to unusual occurrences and assist in emergency responses." Trial Ex. 449. That was an essential function of Marin's job, RP

9/23/2014 at 130:2-131:6, and Marin's psychologist agreed that it could trigger his anxiety, RP 9/11/2014 at 79:18-80:15; 82:6-15. When Marin's anxiety is triggered, he experiences "mental confusion, the inability to concentrate[,] and impaired reasoning and judgment." RP 9/11/2014 27:3-10. This issue presented serious concerns about whether Marin could do his job safely, RP 9/23/2014 at 128:10-130:6, but not one witness testified that he had the ability to do so. Given each of these defects in plaintiff's evidence, no reasonable jury could have found that he proved he could perform the essential functions of his position as a wastewater operator.

b. King County Provided Reasonable Accommodations, and Plaintiff Failed to Engage In the Interactive Process

Plaintiff and King County engaged in multiple exchanges regarding his medical conditions. At the end of each exchange, King County provided Marin with a reasonable accommodation or Marin abandoned his duty to engage in the interactive process.

First, in May 2009, plaintiff informed the County that he was released to work without restriction. Trial Ex. 459. The County confirmed he did not need accommodations in a letter, to which he never responded. Trial Ex. 469; RP 9/8/2014 at 111:1-112:7.

Second, in March 2010, plaintiff requested a permanent transfer as an accommodation, which he received. RP 9/10/2014 at 8:5-10:23.

Third, in April 2010, plaintiff submitted a form indicating he needed legal representation at grievance proceedings. Trial Ex. 173, at 7. Plaintiff offered no evidence that he subsequently had such a proceeding without counsel. And soon afterward, he told the County he did not need accommodations. Trial Ex. 181; *see also* 9/23/2014 at 131:7-134:19.

Finally, after plaintiff left work in January 2011, the County tried to engage him in the interactive process. The County sent letters to Marin (copying his counsel) requesting information about his condition and how it could be accommodated, but he never provided the requested information. *See* RP 9/23/2014 at 147:18-158:19, 160:17-162:19; Trial Exs. 210, 523, 524. The County called Marin and left a voicemail, without response. RP 9/8/2014 at 118:7-119:10. And the County requested a release to speak with his doctors, but he never sent one. RP 9/11/2014 at 98:16-100:25; RP 9/23/2014 at 153:4-154:22. Instead, he unilaterally retired, Trial Ex. 582, and filed this lawsuit. Plaintiff's abandonment of the interactive process forecloses this claim. *See Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 780, 249 P.3d 1044 (2011).

IV. CONCLUSION

For the foregoing reasons, King County respectfully requests that the Court of Appeals affirm the judgment for King County in its entirety.

DATED this 28th day of September, 2015.

CALFO HARRIGAN LEYH & EAKES LLP

By _____

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CERTIFICATE OF SERVICE

I, Yvette Chambers, certify and state as follows:

1. I am a citizen of the United States and a resident of the State of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Calfo Harrigan Leyh & Eakes, LLP, whose address is 999 Third Avenue, Suite 4400, Seattle, WA 98104.

2. I caused to be served upon counsel of record at the addresses and in the manner described below, on September 28, 2015, the following documents:

BRIEF OF RESPONDENT KING COUNTY, WASHINGTON

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

DATED at Seattle, Washington, this 28th day of September, 2015.

Yvette Chambers