No. 47305-4-II

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

BRITT EASTERLY, ELZY EDWARDS and CLIFFORD EVELYN,

Appellants,

v.

CLARK COUNTY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Defendant Clark County ("County") operates the Clark County Sheriff's Office ("CCSO"). CCSO is divided into three branches, each of which is supervised by a separate Chief Deputy and provides distinct aspects of law enforcement services. This case involves the Custody Branch, which operates the Main Jail and the Jail Work Center. Appellant Evelyn ("Evelyn") was a 20-year employee of CCSO who rose to the level of Commander and Appellant Edwards ("Edwards") was a failed applicant to be a Custody Officer. Both Evelyn and Edwards are African-American.

Evelyn and Edwards filed suit in October 2009 alleging race discrimination in violation of the WLAD.[1] Their Complaint outlines a number of perceived slights at the hands of CCSO. In the years of litigation that have followed, CCSO's decision-making process and its legitimate, non-discriminatory reasons for its actions have been painstakingly analyzed and documented by the trial court. These extensive efforts have demonstrated that the perceived slights complained about by Appellants are no more than personal disagreements with legitimate, non-discriminatory management decisions, often based on factually erroneous beliefs and none of which reflect any racially discriminatory animus.

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[1] Evelyn and Edwards also alleged Outrage/IIED and Negligence claims which have been dismissed. CP 2286.

The trial court properly granted summary judgment on Evelyn and Edwards' WLAD claims because they failed to proffer evidence to either support a prima facie case and/or establish pretext. There are no material facts in dispute and this Court should affirm.

II. STATEMENT OF THE CASE

Appellants Elzy Edwards ("Edwards") and Clifford Evelyn ("Evelyn") appeal the trial court's summary judgment dismissal of their WLAD race discrimination claims. Edwards and Evelyn only appeal the dismissal of their WLAD claims; they assign no error to and advance no argument regarding the dismissal of their Negligence and Outrage/IIED claims.

Edwards and Evelyn, both African-American, aver that the trial court erred in granting Respondent's Motion for Summary Judgment. Edwards, an applicant for a Custody Officer position at the Clark County Sheriff's Office ("CCSO"), contends that there are disputed issues of material fact regarding whether Edwards was not hired because of his race. Evelyn, a 20-year CCSO employee and Commander at the time of his discharge, contends that there are disputed issues of material fact regarding whether he was subjected to disparate treatment and/or a hostile work environment because of his race.

Appellants' cases were litigated extensively in the court below over the past five years. The trial court was very familiar with and understood the facts and spent nearly four months analyzing and evaluating the parties' summary judgment briefs and supporting evidence. The record evidence demonstrates that there are no disputed issues of material fact and that reasonable minds could reach only one conclusion —summary judgment dismissing Edwards and Evelyn's WLAD claims was properly granted.

A. Facts Regarding Appellant Edwards

Edwards applied for a Custody Officer position at CCSO in late 2007. CP 1565. Following successful completion of the initial testing steps, all applicants are required to submit a Personal History Statement ("PHS") as part of a background investigation and a background investigator is assigned. CP 385. The PHS makes clear that willful omissions are cause for disqualification. *Id.* Further, Civil Service rules provide that the application of any applicant who "[h]as made any material false statement or has attempted any deception or fraud in connection with any civil service examination" will be rejected. CP 1166. Complete truthfulness in the background investigation process is imperative because considerable public trust is placed in law enforcement officers.

Accordingly, CCSO places great weight on complete honesty in the application process. CP 2218.

Detective Tim Hockett ("Hockett") was assigned as Edwards' background investigator. Hockett reviewed Edwards' PHS and identified numerous, potentially disqualifying issues. Of utmost concern, Hockett discovered that Edwards had failed to disclose two prior arrests and three convictions. Edwards understood when completing the PHS that if he deliberately omitted or falsified anything, he could be disqualified from the application process. CP 276. CCSO considers omissions of arrests and/or convictions to be deliberate since these are things not likely to be forgotten, particularly by someone who wants to work in law enforcement. CP 38, 225-26, 229-230.

Following review of Edwards' PHS, Hockett and Edwards mutually agreed upon January 21, 2008 as the date for Edwards' background interview. This was a normal workday for CCSO officers, although it was MLK Day that year. CP 38. Hockett did not realize it was MLK Day until the morning of the interview since Hockett's calendar at that time did not display any holidays, including MLK Day. CP 2176. Other CCSO background interviews have occurred on MLK Day. CP 38.

When scheduling the interview, Hockett was unaware of Edwards' race.[2] CP 2176. Edwards did not mention to Hockett that the date they mutually selected was MLK Day, did not suggest any other date, nor did Edwards express any apprehension about the chosen date or otherwise request to reschedule. CP 2175-76. Had Edwards expressed any concern about the date, Hockett would have rescheduled. CP 2175-76. On the morning of the interview, Hockett called Edwards but Edwards did not answer the phone or return the call. CP 2176.

During the interview, Edwards was very evasive, causing the interview to be more lengthy than usual. CP 2177. Hockett questioned Edwards about his PHS, including giving Edwards a chance to explain his omission of the arrests and convictions Hockett discovered. Edwards conceded that the omitted arrests and convictions were "one of the most demoralizing points in [his] life." CP 229, 286, 397. During the interview, Edwards expressed concern that these omissions from his PHS were going

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[2] In his opening brief, Edwards erroneously contends that "Hockett had a form indicating Edwards' race and a photo identification of Edwards in his investigative file, which he had reviewed to prepare for the interview." App. Br. 6. In reality, Hockett, consistent with his practice, did not ask for or receive Edwards' drivers' license until *during* the interview. CP 2176. Moreover, the form referenced by Edwards was but one of hundreds of pages in his investigative file and Hockett was working on two other background investigations at the same time for other interviews just before Edwards' interview. *Id.* Additionally, the race information on the referenced form is notoriously inaccurate and unreliable . Accordingly, Hockett did not seek, refer to or rely on such information. *Id.*

to disqualify him. CP 231, 395-396, 398. Hockett's conclusion following the interview was that Edwards's PHS was incomplete and inaccurate and that Edwards was not a suitable candidate for Custody Officer. Edwards was disqualified from the application process and removed from the eligibility list. CP 232, 248, 362-370.

Edwards appealed his removal and complained about Hockett's interview. CP 69-70. As part of his appeal, Edwards misrepresented to the Civil Service Commission ("CSC") that he had disclosed in his PHS the information about his arrests and convictions that he had, in fact, omitted. CP 95-96. Edwards complained to the CSC about the tone and tenor of his interview, but did not complain that Hockett had engaged in any race-based conduct. *Id.* CCSO had received similar complaints from Caucasian applicants about the tone and tenor of Hockett's interview. CCSO determined that Hockett's interview style was simply not a good fit for background investigations and reassigned him. CP 38.

Hockett was indisputably a rigorous, thorough background investigator. During his less than 2-year stint as a background investigator, he passed only 5 of the 34 applicants that he investigated (14.7%). Although only 38% of the applicants assigned to Hockett were minorities, minorities represented 60% of those that he passed (3 out of 5). CP 225.

Although only 8.8% of the applicants assigned to Hockett were African-American, African-American applicants represented 20% of those that he passed (1 out of 5). [3] *Id.* Hockett passed a much higher percentage of African-American applicants (33%--1 out of 3) than Caucasian applicants (9%--2 out of 21). *Id.* Moreover, during that same time period, Hockett disqualified numerous Caucasian applicants for PHS omissions, many more minor than Edwards' omissions of his arrests and convictions. CP 1943, 2002-2019.

The CSC decided to reinstate Edwards to the hiring process "with reservations" based upon the background concerns about him. CP 70, 421. In response, the Chief Examiner of the CSC erroneously invited Edwards to a June 24, 2008 "Rule of Three" interview —a panel interview with three interviewers—although Edwards' background investigation was not complete.[4] CP 1187.

The Rule of Three panel consisted of one CCSO Commander ("Beltran"), one Sergeant ("Tuggle") and one Custody

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[3] Edwards argues "[a]lthough the County insisted in briefing below that Hockett approved a disproportionate number of 'minorities' as candidates, it does not say 'minorities' from which race or races." This is patently and facially incorrect, as these very statistics were incorporated in Respondent's briefing below. CP 225.

[4] Because Edwards' evasiveness caused his interview to run long, Hockett did not have a chance to ask Edwards a series of Voice Stress Analysis questions in support of a polygraph examination. CP 1195.

Officer ("McCray") which considered a total of five applicants for three positions. Selection by the Rule of Three requires unanimous agreement by all panelists. CP 39, 217-218, 2193.The Rule of Three was overseen by CCSO Human Resources Representative Breanne Nelson ("Nelson"). Nelson has served in this role at least 415 times involving over 3000 applicants in her many years with CCSO HR. CP 2193. No applicant or employee besides Edwards has ever accused Nelson of racial bias or bias of any nature. CP 2192.

There are no rules applicable to the HR Monitor role in a Rule of Three interview. CP 2192. Prior to each interview, Nelson's practice was to provide each panelist a folder containing the applicant's employment history from their PHS and the "Background Investigation Summary" and "Conclusions and Recommendations" pages from the applicant's background investigation report. Nelson followed this same process during the June 24, 2008 Rule of Three. CP 2192-93.

At no point during the Rule of Three process was any candidate's race ever mentioned. CP 194, 215, 245, 249, 427. The panelists filled the openings one-by-one. The first and second openings were unanimously filled by candidates other than Edwards. Beltran was so dissatisfied with the remaining candidates (including Edwards) that she asked Nelson if they could select only two. CP 194, 215, 245,425,1198.

Nelson told the panel that they must select a third candidate. CP 194.

After further deliberation, the panel rejected one applicant but could not achieve unanimity on the choice between Edwards and a Hispanic applicant named DeCastro. All panel members rated Edwards poorly because of his background issues, but Tuggle rated him "unfit" and refused to agree to Edwards.[5] Consistent with her past practice whenever a "split panel" arose, Nelson took the decision to upper management, in this case Undersheriff Joe Dunegan. CP 195, 222. Similarly concerned about Edwards' background issues, Dunegan selected DeCastro over Edwards. *Id.*, CP 218.[6] Dunegan was unaware of Edwards' race when he made the decision. CP 218.

After he was not selected by the Rule of Three panel, Edwards appealed again and raised, for the first time, allegations that the decision not to hire him was racially-motivated. In response, the County

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[5] In their opening brief, Edwards incorrectly states that "he was chosen as a suitable hire after the Rule of Three interview." App. Br. 8. This is wholly inaccurate. It is indisputable that selection by the Rule of Three requires a unanimous consensus and Edwards was never chosen as a suitable hire by the Rule of Three. CP 193, 217-218, 222, 2193, 2223.

[6] In their opening brief, Edwards incorrectly states that "[a] Caucasian applicant with similar "background" issues was selected instead of Edwards." App. Brief 9. Again, this is wholly inaccurate. DeCastro, a Hispanic applicant, was chosen instead of Edwards. CP 217-218, 222.

initiated an internal investigation and also hired an independent investigator ("Goldsmith") to assess both Edwards' complaint and the civil service process. Both investigations were comprehensive and both investigations determined that there was no evidence that Edwards's race played any role in the hiring process. CP 249, 423-427, 447-449.

With respect to Hockett, Goldsmith made detailed comparisons between Edwards's experience and that of other applicants. Goldsmith found "[t]here is no evidence that Hockett's interviewing style varied from applicant to applicant based on race or other criteria; instead, the evidence is that he treated everyone in the same manner" and that Hockett's "judgment was not motivated by racial bias; he appeared to treat all applicants' background with the same "fine tooth comb." CP 1185-1186. Goldsmith agreed with some of Hockett's concerns about Edwards, noting that she had "serious concerns about some of the facts adduced by Hockett" with respect to Edwards' background and "question[ed] how someone could forget having been arrested not only once but twice and fail to put that down on a PHS." CP 1187.

Goldsmith also evaluated the circumstances surrounding a Caucasian applicant, Settell, who also complained about Hockett's interview. Settell was granted a second background interview whereas Edwards was not. Goldsmith found that it was a process error for CCSO

HR Manager Candy Arata ("Arata") to deny Edwards a second interview, but that Arata acted with no negative intent. Rather, Goldsmith found that Arata acted "upon her good faith believe that Edwards would not successfully pass a second background interview due to the omissions and other problems in his background" and "Arata had a genuine basis for her belief, regardless of whether she is ultimately proved right or wrong." CP 1184.[7] Importantly, even had Edwards been granted a second interview, the other background investigator at the time would have disqualified Edwards for the same reasons. CP 2218.[8]

In comparing Edwards to Settell, significant differences make it clear that Settell and Edwards were not similarly situated applicants. Unlike Edwards, Settell: (1) had no criminal history; (2) did not omit arrests or convictions as an adult in his PHS; (3) did not admit to a felony during his interview; (4) did not have employment instability; and (5) did not have a history of significant financial issues or misrepresent or omit financial information in his PHS. CP 2140. Goldsmith highlighted

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[7] Because of the extensive problems with Edwards' background investigation including *inter alia* an automatic disqualifier (felony theft) and Edwards' omission of arrests and convictions as an adult, Arata did not believe that there was any way that a different background investigator would view Edwards' background differently. CP 2139-40.

[8] In addition to Hockett's disqualification of Caucasians, during the same time period, other CCSO background investigators also rejected numerous Caucasian candidates for PHS omissions. CP 2021-2037.

the fact that Settell did not omit arrests or convictions from his PHS as Edwards had and that although Caucasian, Hockett disqualified Settell for a very nominal reason—taking $61.00 worth of small office items over his 10-year career in the military. CP 1182.

With respect to Nelson, Goldsmith again found only process errors. Goldsmith found that although valid concerns about Edwards' background existed, Nelson erred in emphasizing those background issues to the Rule of Three panel. CP 1186. Goldsmith concluded that it was "difficult to decide" why Nelson did what she did, but made no finding that Nelson acted with any discriminatory intent. CP 1186.

Because of these process errors, Goldsmith recommended that Edwards be reinstated at the background investigation step. CP 1188. The County offered such reinstatement to Edwards and he rejected it. Subsequently, even more favorable to Edwards, the County offered Edwards reinstatement at the Rule of Three stage. Edwards also rejected that offer by the County. CP 249, 456.

B. Facts Regarding Appellant Evelyn

Evelyn was hired as a Custody Officer on July 17, 1989. CP 584. Evelyn was repeatedly promoted by CCSO--first to Sergeant, then Lieutenant, then Commander. According to Evelyn, he was promoted

faster than usual for CCSO and faster than his personal goal. CP 584-85. Jackie Batties Webster ("Batties"), an African-American woman, joined CCSO as a Custody Officer a few years before Evelyn and they knew each other Evelyn's whole career at CCSO. CP 610. Like Evelyn, Batties was repeatedly promoted, ultimately to Chief of CCSO's Custody Branch. Due to the timing of their promotions, Evelyn was at all times Batties' subordinate. Thus, when Evelyn was discharged, two of the most senior members of management at CCSO were African-American. CP 622.

Despite that fact that Batties was always Evelyn's superior officer, throughout their 20-year work history together, Evelyn was consistently rude and disrespectful to Batties, brazenly challenged her authority and they frequently "butted heads". CP 1651. Evelyn went beyond his assigned work duties to create issues with Batties and drafted harsh memos to her, even going so far as to baselessly accuse her of compromising her personal ethics and allowing fiscal improprieties to occur. CP 593. Evelyn continued to attack Batties even after Undersheriff Dunegan supported Batties' decision-making. CP 592, 632-35. According to another Commander, Evelyn "loses sight that Jackie is the boss" and that "if [Evelyn] was in the private sector, he wouldn't even have a job". CP 1153, 1370-72.

After reviewing and editing it, Evelyn submitted his complete complaint about Batties in May 2008. CP 657-59. In total, Evelyn raised 7 issues about Batties over their 20-year work history. Nearly all of Evelyn's complaints about Batties involved Evelyn second-guessing Batties' command decisions. Evelyn complained about how Batties handled: (1) Evelyn's complaint about another Commander's (Costa) practices documenting time off [9]; (2) an assault complaint against Evelyn; (3) a complaint by a Custody Officer about wearing his uniform off-duty; (4) a conflict between Evelyn and a manager from another department; (5) a complaint a sergeant made to Batties about Evelyn; (6) an inmate's complaint about Evelyn; and (7) Batties made a one-time statement that she has a problem with black men that date white women. *Id.* Evelyn's summary of his complaint about Batties was that Batties disciplined him and/or ignored violations of others "based on her personal relationships with them" and that "[w]ho he chooses to date" should not affect his treatment at work. *Id.*

Evelyn's complaint was thoroughly investigated and no evidence of discrimination or disparate treatment was found. CP 661-64. Evelyn testified that he had never met the investigator (Curtis) before and

[9] Evelyn admits that it was not part of his duties to investigate vacation time of other Commanders. CP 592.

had absolutely no reason to believe that she had any bias or personal animus towards Evelyn. CP 611. Nevertheless, Evelyn challenged Curtis' competence and objected to the investigator making recommendations to improve his relationship with Batties. CP 666.

In 2007-2008, Evelyn was the Main Jail Operations Commander and was responsible for overseeing inmate medical care. CP 596, 622-25. Wexford Health Services ("Wexford") was providing medical services to the inmates in the Clark County Jail. CP 12. Approximately ten, female Wexford employees worked at the jail. CP 596. Although not Evelyn's direct subordinates, Evelyn controlled all of the Wexford employees' clearances for jail access, effectively determining whether or not they could work. CP 596-97. Evelyn understood that CCSO's and the County's Harassment Policies covered contractors and vendors working at the jail.[10] CP 618. Despite this, Evelyn engaged in egregious, humiliating sexual harassment of numerous Wexford employees.

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[10] In February 2008, Sheriff Gary Lucas ("Lucas") and Arata attended the Commander's meeting to reinforce CCSO's expectations and compliance with its Harassment Policy. CP 40-41,237-38,252, 644-46. Evelyn recalls attending the meeting, sitting next to Lucas, and the Sheriff telling him that he had "zero tolerance" for harassment. CP 608. It was conveyed to the Commanders that similar to the axiom "you lie, you die" in law enforcement, the new standard for violations of the Harassment Policy would be termination as the starting point, with mitigating or aggravating circumstances applied to determine the propriety of lesser discipline, and that intent was not a consideration. CP 40-41, 237-38, 644-46.

On September 5, 2008, Andrea Aranson ("Aranson"), a Wexford mental health counselor, called a CCSO sergeant to make a complaint against Evelyn. CP 669, 910-11. CCSO's initial discussion with Aranson resulted in the conclusion that her complaint was more an "expectation and service complaint" about performance issues rather than a harassment complaint. CP 670, 1484. However, on September 25, 2008, Aranson complained again, this time that Evelyn had "subjected [her] to a hostile work environment to the point of being harassed." CP 670, 1486-1487. Aranson stated that Evelyn had an unprofessional, condescending demeanor and that he made "lewd, inappropriate, and discriminatory remarks." *Id.* On September 30, Batties sought additional information and asked Aranson what type of comments Evelyn made. Aranson told her that Evelyn said "once you go to a black man, you never go back to white." CP 1485.

As a result, on October 22, Arata and Internal Affairs Sergeant Dan Schaub ("Schaub") met with Aranson. CP 673-679. Aranson described badgering, antagonizing, critical and rude behavior by Evelyn that at times brought Aranson to tears. CP 673. Aranson also stated that Evelyn had made sexually inappropriate comments to her, such as "[t]hat shirt looks very becoming on you, especially in the chest area." CP 675. Aranson also stated that she was present when Evelyn told her

colleague, Kelly Epperson ("Epperson"), that "once you go black, you never go back". CP 674.

The following day, Arata and Schaub met with Epperson. Epperson stated that Evelyn would frequently come upstairs to her office, shut the door, and they would talk. Epperson said "for me, it's professional, for him...I'm not really so sure what he sees it as."[11] CP 68. Epperson described that Evelyn would say things to her and she would think to herself, "[w]ell, if I were in a hospital, he would be fired for it." [12] CP 685. When Arata asked, Epperson clarified that "he says a lot of sexual things." *Id.* Evelyn frequently commented on her breasts, including in a humiliating fashion in front of inmates. CP 686-688. After the humiliation, Evelyn laughed and told her "you're really cute when you're angry." *Id.* The next day, Evelyn threatened Epperson that "I'm a commander and no matter what you or your staff say to anybody here,

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[11] Evelyn's testimony supported Epperson's complaint and concerns about Evelyn. Although Evelyn's duties included responsibility for a number of other areas, Evelyn testified he spent extended periods of time -- as much as 3 to 4 hours a day -- on the medical unit floor. CP 614. Evelyn testified that he developed a relationship with Epperson that -- at least for Evelyn -- went beyond purely professional. According to Evelyn, "*most of the time* it was a work relationship." *Id.* (emphasis added). Evelyn admitted he would have Epperson come to his office in the mornings and Evelyn would go to Epperson's office in the afternoon for long, closed-door meetings where Evelyn questioned Epperson about her personal relationships. CP 614-15.

[12] Strikingly similar to Evelyn's fellow Commander's statement that "if [Evelyn] was in the private sector, he wouldn't even have a job" because of his overt disrespect for Batties. CP 1153, 1370-72.

they're going to believe me over you, because I'm a commander and you're not. And unless you have a witness to say what I say, it's just your word against mine and you'll never win." *Id.*

Evelyn also told Epperson that "white guys don't know how to have sex very well, but I could ride you so hard and you'd be so wet you wouldn't be able to walk straight for three days", called her "boob" on virtually a daily basis and made the comment "once you go black, you never go back" "all the time." CP 686-89.

Epperson reported that in addition to Aranson, other female Wexford employees (Julie Higgins ("Higgins") and Nancy Reudink ("Reudink")) had also complained to her about comments Evelyn made to them and that she had reported Evelyn to Martha Ingram ("Ingram") at Wexford. She also said that Evelyn frequently threatened Wexford staff that he could pull their staff clearances for jail access and prevent them from working. CP 689-93.

With the need for further investigation confirmed, Evelyn was served with a notice of internal complaint and investigation and a notice of paid administrative leave. [13] CP 41, 61-62, 64-65. The investigation was thorough and exhaustive and included 32 witness

[13] Evelyn's administrative leave notice contained similar terms and requirements as other administrative leave notices. *Id.*

interviews, including 17 witnesses proposed by Evelyn. CP 671-672.

Evidence obtained included:

- **Ingram** stated that Epperson complained to her about inappropriate comments by Evelyn "of a slimy nature", including comments about her breasts, that "[h]e could please her like she had never been pleased before, the emphasis being because he was black", and that Epperson was "scared to death for her job." CP 694.
- **Reudink** stated that Evelyn would talk about her "big tits", wad up candy wrappers and try to throw the paper balls down her cleavage since "apparently he thought my cleavage was a basketball hoop", tell her that her boyfriend "doesn't know how to please me, he would do me all night long" and "once you go black, you never go back", tell her that he would "[r]ide her like [she] rides her Harley", frequently commented about women's "tits" and "asses", and frequently threatened to pull the clearances of the Wexford employees. Reudink stated that both Epperson and Higgins complained to her about Evelyn's inappropriate comments and "It's not a big secret. I mean, I guess you know how he behaves down here on this floor (the medical unit) is different from how he behaves up there on that floor." CP 696-704.
- **Higgins**, who had not worked at the jail or for Wexford for 8 months at the time, stated it was time someone filed a complaint against Evelyn because he made the jail "a chaotic, nerve wracking mess." Epperson complained to Higgins that Evelyn said to her "[o]h, if I dated you, I'd ride you so hard". Evelyn commented about Higgins' breasts and ass and barged into the room when she was pumping breast milk and said, "[y]ou got all of that out of your tit?" Higgins said Evelyn often made degrading comments about women's bodies and she complained about Evelyn to Mariann Forkgen ("Forkgen"), Wexford Health Services Administrator, and Nick Little, Wexford Director of Underwriting and Contract Compliance. CP 706-10.
- **Forkgen**, who had quit 5 months earlier because of Evelyn, stated that Evelyn created "a constant environment fraught with turmoil, sexual innuendos, and nastiness", called the Wexford female employees "a bunch of fucking incompetent idiots" and that most of the staff complained to her about Evelyn. Evelyn commented on

Forkgen's breasts, said "once you go black, you never go back", and said a female officer was "all ass and tits." Epperson complained to Forkgen that Evelyn said to her "I would bend you over this table and work you hard." Forkgen complained to Wexford about Evelyn's "constant verbal assaults on my staff, as well as sexual advancements to the female members of my team." CP 723-31, 935-36.

- Rita **Laurent**, a mental health counselor at CCSO for over 30 years, expressed strong concerns about retaliation from Evelyn like the other Wexford employees because Evelyn had threatened to pull Wexford employees' security clearances. Laurent stated that Evelyn had commented to her that "once you go Black, you never go back", Epperson complained to her about Evelyn's sexual comments, and she had heard about Evelyn using Reudink's breasts like a basketball hoop. Laurent warned Evelyn to stop but Evelyn said, "The county's not going to do anything to me, because they know what I can do to them", threatening a lawsuit. CP 710-718.

The investigation corroborated the complaints about Evelyn's harassment and the investigation report recommended sustained findings that Evelyn violated CCSO General Orders regarding Harassment, Courtesy and Competency and that Evelyn also violated Clark County's Harassment policy. CP 904-909. Evelyn testified that if he engaged in the conduct complained of by the Wexford female employees, he violated applicable harassment policies. CP 618.

On June 18, 2009, Dunegan sent Evelyn a "Loudermill Notice" indicating that CCSO was considering discipline up to and including termination for Evelyn's violation of the Harassment, Courtesy

and Competency policies. CP 960. Evelyn submitted a written response to the Loudermill Notice on June 23, 2009. CP 962-66.

Prior to taking disciplinary action, the County offered Evelyn the opportunity to separate from service via a retirement agreement. Evelyn declined the County's offer. CP 968-69. On June 25, 2009, Sheriff Lucas issued Evelyn a notice of termination for violation of the referenced policies. CP 968-69. Evelyn agrees that he has never been given any other reason for his discharge other than the reasons set forth in the June 25, 2009 termination letter. CP 619. The Commander's Guild filed a grievance over Evelyn's discharge but unanimously agreed not to take Evelyn's grievance to arbitration. *Id.*

III. ARGUMENT

A. Standard of Review

Respondent agrees only with the first and last paragraphs of Appellants' statement of the proper standard of review. App. Brief 14-15. In all other respects, Appellants present an incorrect or incomplete statement of applicable law.[14]

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[14] Citing *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn. 2d 203, 214, 87 P.3d 757 (2004), Appellants state that the legislature intended the WLAD to be a dynamic instrument to be liberally and broadly construed. However, *Blaney* did not suggest any lesser or different standard of review for WLAD cases dismissed at the summary judgment stage. In fact, *Blaney* was not a review of a summary judgment dismissal. Rather, the Court in *Blaney* analyzed whether the lower court erred in instructing the jury regarding damages and remedies. *Id.* at 207.

[Footnote continued on next page]

This court reviews de novo a trial court's grant of summary judgment, engaging in the same inquiry as the trial court. *Korslund v. DynCorp Tri–Cities Servs., Inc.,* 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Appellants must establish specific and material facts to support each element of their prima facie cases. *Hiatt v. Walker Chevrolet Co.*, 120 Wn. 2d 57, 66, 837 P. 2d 618 (1992). Assuming *arguendo* that Appellants can establish prima facie cases, the County has proffered legitimate, non-discriminatory reasons for its actions. Thus, the burden shifts back to Appellants to show that the County's stated reasons are actually a pretext for discrimination. If Appellants fails to make this showing, the County is entitled to judgment as a matter of law. *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 149, 279 P.3d 500 (2012) (internal citations omitted).

To prove pretext, Appellants must produce either direct evidence or specific and substantial circumstantial evidence that the County's proffered reasons are unworthy of belief. *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 87-89, 98 P. 3d 1222 (2004);

[Continued from previous page]

Appellants do not and cannot cite any case that suggests that any lesser or different standard applies to review of a summary judgment order granting dismissal of a WLAD claim.

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993). To prove the proffered reasons are unworthy of belief, Appellants must produce specific and substantial evidence that the County's articulated reasons: (1) had no basis in fact; (2) were not really motivating factors for the decision; (3) were not temporally connected to the adverse employment action; (4) were not motivating factors in employment decisions for other employees in the same circumstances; or (5) produce sufficient evidence that discrimination was nevertheless a substantially motivating factor in the employment decision. *Scrivener v. Clark College*, 181 Wn. 2d 439, 448, 334 P.3d 541 (2014).

Summary judgment is appropriate if the plaintiff "created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Conclusory, speculative testimony in affidavits is insufficient to establish pretext. *Thornhill Publishing Co. Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.1979). Bare assertions that a genuine material issue exists will not defeat summary judgment in the absence of actual evidence. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

B. There Are No Disputed Issues of Material Fact Regarding Edwards' Disqualification from the Hiring Process and the Trial Court Did Not Err in Dismissing Plaintiff Edwards' WLAD Claim.

1. Edwards was not qualified for a position as a CCSO Custody Officer and he failed to establish a prima facie case.

To establish a prima facie case of race discrimination under WLAD, a plaintiff must show that: (1) he is a member of a racial minority; (2) he applied for and was qualified for an available job; (3) he was not offered the position; and (4) after his rejection, the position remained open and the employer continued to seek applicants from other persons with the plaintiff's qualifications. *Hill v. BCTI Income Fund*, 144 Wn. 2d 172, 181, 23 P. 3d 440 (2001). To demonstrate that he is qualified for a job at the prima facie stage, a plaintiff need only present evidence from which a reasonable trier of fact could infer that he possessed the minimum qualifications for the position or that his qualifications were comparable to those of the person awarded the position. *Lyons v. England*, 307 F.3d 1092, 1114 (9th Cir. 2002).

Citing *Dedman v. Washington Pers. Appeals Bd.*, 98 Wash. App. 471, 484, 989 P.2d 1214 (1999), Edwards argues that the County misconstrued the term "qualified" as it applies in the discrimination context and that "qualified" means only "capable of performing the job for which the candidate applied." App. Br. 20. However, under Washington

law, "qualified" does not possess the limited definition described by Edwards.[15]

First, *Dedman* is distinguishable in that the specific issue before the *Dedman* court involved an allegation of disability discrimination and failure to reasonably accommodate. *Id.* at 482-83. Although the court failed to define the term "qualified" in the manner Edwards represents, the facts in *Dedham* focused on physical limitations and whether such limitations could or had to be accommodated. Thus, to the extent "capability" of performing a job was contemplated, the facts in *Dedham* focused exclusively on physical capability and provide no assistance here.

Second, the express rules governing CCSO's application process demand that complete honesty and truthfulness are minimum qualifications for a position. Every CCSO applicant must attest and Edwards attested:

> I hereby certify, under the penalty of perjury in the State of Washington, that this application **contains no willful misrepresentation** and that **the information given is true and complete** to the best of my knowledge and belief. I

[15] Edwards incorrectly contends that the County "claimed that omissions on his personal statement and his retention of two cable boxes that professional movers accidentally packed in Florida meant that he could not establish the prima facie element of qualification." App. Br. 20. In reality, these are but two of the seven issues that Hockett identified in Edwards' background report. CP 362,370

> authorize the investigation of any or all statements contained in this application. I also authorize any person, school, current employer, past employers and organizations to provide relevant information and opinions that may be useful in making a hiring decision. I am aware that **should an investigation at any time disclose any such misrepresentation or falsification, my application may be rejected**, my name may be removed from consideration or I may be discharged from my employment. CP 1565 (emphasis added).

Similarly, CCSO's PHS requires all applicants to attest and Edwards attested:

> I hereby certify there are **no willful misrepresentations, omissions or fabrications** in the foregoing statements and answers to questions. I am fully aware that **any such misrepresentations, omissions or falsifications will be grounds for immediate rejection of application** and/or termination of employment. CP 385 (emphasis added).

Edwards does not dispute the validity of these requirements and complete honesty in the application process is indisputably a minimum qualification for employment as an officer at CCSO.

Third, the public policy in Washington mandates that as a qualification to work in law enforcement, personnel must be "truthful and honest" in their conduct. RCW 43.101.021. Ex A. Further supporting this policy, the legislature has mandated that a law enforcement agency such as CCSO is permitted to have and respond to heightened concerns about the truthfulness of its job applicants. RCW 49.44.120 (exempting law

enforcement employers from the prohibition against polygraph examinations in employment). Ex B. Furthermore, there is no protection under Washington law for an applicant who misrepresents their history in application materials. *See Boring v. Alaska Airlines, Inc.*, 123 Wn. App. 187, 199, 97 P.3d 51 (2004) (finding no public policy exception to employment at will doctrine to protect job applicant's ability to misrepresent facts on a job application).

Edwards was unqualified to be a Custody Officer because he lacked the requisite honesty and integrity. That Edwards lied about prior arrests and convictions amplifies this reality.[16] [17] However, beyond the dishonesty, Edwards further lacked qualification because, more broadly, he could not pass the requisite background screen—a clear qualification for employment as a Custody Officer. Somewhat incredibly, Edwards argues that his background issues discovered by Hockett "do not

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[16] It is both troubling and representative that even at this juncture, Edwards continues to misrepresent to this Court, as he did below, that he cured the omissions of the prior arrests and convictions in Hawaii through a supplement to his PHS. App.Br. 6-7. Edwards made the same misrepresentation to the CSC on his initial appeal. CP 1172. In reality, Edwards admitted in his deposition that although he *thought* he put that information in his supplement, the only arrest he disclosed in his PHS was his arrest for assault for spanking his son. CP 277.

[17] Tellingly, Evelyn was arrested a number of times prior to applying to become a Custody Officer with CCSO. However, unlike Edwards, Evelyn disclosed his arrests during his application process for Custody Officer and he was hired by CCSO. CP 582-83, 591.

relate to job qualifications" of a Custody Officer. App. Br. 20. Edwards' contention is baseless.

Hockett found Edwards unqualified for a host of reasons. [18] Edwards blithely contends that his "perceived lack of candor" on his PHS and "credit history" were "non-job related matter[s]." *Id.* However, it is axiomatic that truthfulness and integrity are essential in law enforcement positions that safeguard the public's trust. Moreover, credit history and even "financial challenges common to many people" (App. Br. 6) are directly related to the Custody Officer position because an officer facing financial hardship may be more susceptible to taking a bribe or engaging in some other inappropriate exchange or transaction. CP 357-358. [19]

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[18] Hockett disqualified Edwards for the following reasons: (1) omission of two arrests and three convictions; (2) omission of police detention for damaging public property; (3) omission of police detention during four domestic disturbances; (4) omission of residences; (5) having three credit accounts in collections for which he had taken no action to resolve or satisfy; (6) felony theft of three cable boxes; and (7) employment instability. CP 362-70.

[19] Edwards also facially lacked qualification because he admitted to felony theft during his interview. Although Edwards characterizes this as an "accidental retention" (App. Br. 6), Edwards admitted in his interview to being in *then-current possession of three cable boxes that he acknowledged were not his* that were valued at $941 according to a collection agency reported debt *that Edwards failed to disclose in his PHS.* CP 1943, 1980. This constitutes Theft in the Second Degree, a class C felony. RCW 9A.56.040. Ex C. Edwards' admission was disqualifying under CCSO's standards. CP 248, 401, 2139. Although not an automatic disqualifier under the criminal standards, Edwards' omissions of his arrests and convictions would have been a disqualifier regardless of who conducted his background investigation. CP 2139, 2218. Both Hockett and the other CCSO background investigator at the time disqualified numerous Caucasian applicants for PHS omissions. CP 2002-2037.

Edwards failed to establish that he was qualified for the position of Custody Officer at CCSO and thus failed to establish a prima facie case. [20]

2. Edwards failed to establish that CCSO's legitimate, non-discriminatory reasons for not hiring him were a pretext for discrimination.

a. There is no record evidence that Dunegan acted with or was influenced by any racial bias.

It is undisputed that Undersheriff Dunegan made the decision not to select Edwards for the third Custody Officer position following the June 24, 2008 Rule of Three interview. Dunegan was unaware of Edwards' race when he made the decision. CP 195, 217-218.[21] Edwards proffers absolutely no evidence that Dunegan was motivated by Edwards' race. Rather, he advances a "cat's paw theory" that two others—Hockett and Nelson— created circumstances that were

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[20] Edwards attempts to buttress his argument that he was qualified by claiming that "the [Rule of Three] panel approved his hiring." App. Brief 21. This is untrue since a unanimous consensus is required and was not achieved by Edwards. CP 39, 193, 217-218, 222. Moreover, Edwards' subsequent hire by the WA Department of Corrections ("DOC") fails to establish qualification for a position at CCSO because the DOC's qualification standards differed from CCSO's, including lacking any criminal history inquiries as part of Edwards' background investigation that would have required Edwards to disclose the arrests and convictions that Edwards omitted from his CCSO PHS. CP 1944, 2039-2044.

[21] Edwards inexplicably argues that there is "no basis in the record" that Dunegan was unaware of Edwards' race when he made the decision to select DeCastro over Edwards. App. Br. 24. Edwards is incorrect.

both motivated by Edwards' race and calculated to ensure that Edwards would not be selected. Edwards contends that Dunegan, "relied on Hockett and Nelson, who showed serious bias against Edwards." App. Br. 23. However, there is no credible evidence that either Hockett or Nelson acted with racial bias and Edwards "cat's paw" theory fails.[22]

b. Hockett's conduct fails to evidence pretext.

(1) The scheduling of Edwards' background interview reflects no animus.

Edwards makes much of the fact that his interview with Hockett occurred on MLK Day. However, Edwards fails to establish that this scheduling was a pretext for discrimination.

First, Hockett was unaware when scheduling the interview that Edwards was African-American. CP 231. Edwards claims that this lack of knowledge is unbelievable, citing three pages of documents out of the hundreds of pages in his background investigation file. App. Br. 24; CP 1244-1246. However, one of documents—Edwards' drivers' license--was produced at the interview itself, long after the scheduling. CP 1984.

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[22] Edwards deceptively suggests that the County argued below that Edwards' claims were legally deficient because Dunegan, Hockett or Nelson "made no direct statements of racial bias." App. Br. 22. While it is true that Edwards admits that no race-based statement was ever made by anyone at CCSO, there were many other reasons in addition to this one that formed the basis of CCSO's argument. CP 133-144, 1879-96.

Another of the pages was created after the interview was already scheduled. CP 1994, 1245.[23] The third page is part of a report wherein race is not self-identified and is therefore historically very unreliable and not something Hockett referred to as part of his investigation. CP 1244, 2176-77.[24]

Second, there is no basis to find discriminatory motive in an uncontested, mutually-agreed scheduling decision. Edwards admitted in his deposition that: (1) Hockett did not direct him to appear that day, but rather asked him *if* he was available that day; (2) Edwards said he was available and agreed to conduct the interview that day; and (3) Edwards could have--but did not—ask Hockett to reschedule the interview. CP 247, 278. At no point did Edwards ever indicate that it was not a good day for him and Edwards testified that under no circumstances would he have requested the date be changed because he "wanted to get it done." CP 1675.

Third, MLK Day was a normal workday for Hockett and

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[23] Edwards testified that the interview was scheduled "approximately a week to two weeks before the scheduled interview on January 21, 2008." CP 1994. The "Law Enforcement Report" cited by Edwards was run on January 15, 2008—less than one week before the interview. CP 1245.

[24] Moreover, Hockett's duty as a background investigator is to verify and identify relevant information that may not have been revealed in the application materials. Arrest records are relevant to that inquiry; a candidate's race is not.

he was unaware when they scheduled the interview that the day agreed to was MLK Day because it was not on his calendar. CP 2176. Moreover, background interviews are and have been conducted on many holidays, including Martin Luther King Day, if mutually agreed to by the parties involved. CP 38.

The trial court properly recognized that no reasonable juror could infer discriminatory animus based on the scheduling of Edwards' interview.

(2) Hockett conducted background investigations the same way for all applicants.

Citing a 21-page section of investigator Goldsmith's report, Appellant also contends that a material factual dispute exists based on Hockett's conduct during Edwards' background investigation interview. App. Br. 23-24. Edwards testified that Hockett never said anything to him of a racial nature. CP 1944, 2064. Nonetheless, Edwards claims that because of his race, his interview was unduly long, unprofessional, and aggressive. *Id.* However, in reality, Goldsmith concluded that Hockett's background investigations "were sound", "the facts he unearthed and wrote about were correct", "[t]here is no evidence that Hockett's interviewing style varied from applicant to applicant based on race or other criteria; instead, the evidence is that he treated everyone in the same

manner", and that Hockett's "judgment was *not motivated by racial bias*; he appeared to treat all applicants' background with the same "fine tooth comb." CP 1185-1186 (emphasis added).[25]

Edwards introduced no evidence—let alone specific and substantial evidence—that Hockett's actions were based on anything other than the obvious flaws in Edwards's application materials. When questioned why he believed that Hockett sought to exclude him due to his race, Edwards testified "Like I said, it's just a feeling that I have" and "[why] else, why else would he go through the trouble to see me removed from the process... that's the answer to your question right there." CP 1944, 2064-2065. The Washington Supreme Court has made clear that such "why else?" evidence fails to establish pretext. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d 355, 361, 753 P. 2d 517 (1988).

c. Arata's conduct fails to evidence pretext.

Again citing to a broad section of Goldsmith's report, Edwards claims that "the County did treat a white applicant differently

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[25] It is important to note that Hockett disqualified a Caucasian applicant who was interviewed just four days before Edwards for omitting speeding tickets, an accident and a seatbelt violation from his PHS. CP 2002-2010. Hockett did not even grant an interview to two other Caucasian applicants who omitted arrests from their PHSs. CP 2011-13. Hockett disqualified another Caucasian applicant with no criminal history, but listed one traffic ticket but omitted another (similar to Edwards), failed to list a bankruptcy as "civil litigation", and failed to disclose his wife's car as a debt even though his wife makes the payments (similar to Edwards' AMEX omission). CP 2014-19.

than Edwards, one with a troubling 'background' like one it says disqualified Edwards," referencing the fact that Settell was granted a second background interview by Arata and he was not. App. Br. 24-25. However, Goldsmith's report defeats rather than supports Edwards in this regard and Arata's conduct fails to evidence pretext.

First, Edwards is incorrect in stating that Settell had a troubling background like his. Edwards' background was vastly worse than Settell's and Goldsmith detailed some of those differences. CP 1882-1886.[26]

Second, Settell was actually treated worse by Hockett than Edwards was. Goldsmith found that Hockett's intense interview style "treated *both* candidates as though they were criminal suspects instead of job applicants. " CP 1186 (emphasis added). However, whereas Goldsmith ascribed weight to Edwards' omission of arrests, poor credit history, and retention of the cable boxes as grounds for disqualification, Hockett disqualified Settell for a very nominal reason—taking a few small office items worth a total of $61.00 over the course of ten years. CP 1149, 1182.

Third, contrary to Edwards' suggestion, Goldsmith

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[26] Because of these differences, Settell was not similarly situated to Edwards and is not a valid comparator. *Aragon v. Republic Silver State Disposal, Inc.* 292 F.3d 654, 660 (9th Cir.2002).

expressly did "not ascribe any negative intent to Arata's decision" to grant a second interview to Settell but not Edwards. Rather, Goldsmith ruled out an unlawful motivation and concluded that Arata "made a process mistake based upon her good faith belief that Edwards would not successfully pass a second background interview" "due to the omissions and other problems in his background." CP 1184.

d. Nelson's conduct fails to evidence pretext.

Edwards claims that Nelson, who served as HR Monitor for his Rule of Three interview, "showed serious bias against Edwards" and treated him differently than a Caucasian applicant that was hired. App. Br. 23-24. In fact, Edwards proffers no evidence that Nelson took any action on his application based on his race and Nelson's conduct fails to evidence pretext.

(1) Nelson chose not to remove Edwards from the hiring process.

Despite Edwards' rhetoric, Nelson's actions belie his claims. On the day of the Rule of Three interview, Nelson rejected a clear opportunity to remove Edwards.[27] Of the five candidates, the interview

[27] Edwards admits that Nelson and all of the Rule of Three panelists treated him respectfully during the process. Edwards further admits neither Nelson nor any of the panelists made any racial slurs or said anything at all that he found offensive. CP 1944, 2061.

panel only liked two of them—not including Edwards. Beltran asked Nelson if the panel could select only two applicants. Significantly, *Nelson insisted that the panel select a third candidate.* CP 194, 215, 245,425. If Nelson truly possessed the discriminatory intent alleged by Edwards, she could have simply and easily agreed with Beltran and stopped the selection process, guaranteeing Edwards would not be hired. Instead, Nelson insisted that the panelists consider Edwards and others for a third position. *Id.* This is strong counter-evidence of discriminatory animus.

(2) There is no evidence that Nelson possesses any racial animus.

Edwards testified that he believed Nelson was biased against him because Nelson allegedly had a personal relationship with Dennis Pritchard ("Pritchard"), whom Edwards believed was a close personal friend of Hockett. CP 293-294. Thus, Edwards alleges that Hockett—through Pritchard—influenced Nelson to become Hockett's "discriminatory pawn." *Id.* Edwards' conspiracy theory is based on hearsay and false information and fails to aid Edwards.

Edward's conspiracy theory about Nelson being Hockett's "discriminatory pawn" lacks any evidentiary support. Edwards has no personal knowledge about this alleged close personal friendship between Pritchard and Hockett. Rather, this is merely hearsay Edwards learned

from by Evelyn. CP 248-294. Moreover, the hearsay Evelyn fed to Edwards is factually incorrect. Pritchard and Hockett are not friends at all. Rather, they are distant work acquaintances who have never worked on the same squad or shift, never discussed Edwards or anything having to do with Nelson's work, and barely say a passing "hi" in the hall. CP 141-144, 280-29, 232-233, 248, 293.

Moreover, Edwards testified that Nelson never said anything to him that reflected any racial animus, and, in fact, never said anything at all during his Rule of Three interview. CP 247, 293. Of the many thousands, no other applicant or employee has ever accused Nelson of racial bias or of any type of bias. CP 2192. Thus, Edwards suggestion that Nelson possesses racial animus is no more than unsupported, conclusory speculation that fails to constitute competent evidence to establish pretext. *Grimwood, supra*, 110 Wn. 2d at 359.

(3) Nelson's conduct both during and after the interview lack any inference of racial animus.

Edwards alleges that Nelson "broke rules and took actions to influence the [Rule of Three] panel against Edwards" and "lobbied" against Edwards to Dunegan. App. Br. 8, 25. There is no record evidence to support either that Nelson did so or that any of her actions were because of Edwards' race.

As an initial matter, there were no rules governing the HR Monitor position for Nelson to break. CP 2140, 2192. Furthermore, Edwards relies entirely on the deposition testimony of Beltran and Beltran's interview with Goldsmith in arguing that Nelson's conduct during Edwards' Rule of Three interview reflects racially disparate treatment and evidences pretext. However, unlike Nelson, Beltran's participation on Rule of Three panels was limited and Beltran had never before been in a "split panel" situation. CP 1944, 2047, 2161.[28]

Grounded in blatant misrepresentations of evidence, the alleged impropriety of Nelson's actions was thoroughly debunked below. CP 1889-1893. But even assuming *arguendo*, there is nothing inherently racial or even an inference of race in any of the alleged actions by Nelson. Edwards proffers nothing to refute the simplest and most plausible explanation for Nelson's conduct-- she did not believe Edwards was qualified or likely to be hired. The record is devoid of any evidence that Nelson's conduct with respect to Edwards, including her discussion with Dunegan, was motivated by anything other than her valid, fact-based

[28] Moreover, Goldsmith's interview notes were summaries and not a perfect memorialization of what was said by a witness. CP 1944, 2125-2126.

concerns about Edwards' background.[29]

Edwards failed to proffer either direct evidence or specific and substantial circumstantial evidence sufficient to establish pretext and the trial court properly dismissed his WLAD claim.

C. The Trial Court Did Not Err in Dismissing Plaintiff Evelyn's WLAD Claim.

Evelyn alleges that he was subjected to unlawful, race-based disparate treatment and a racially hostile work environment at the hands of Batties, his African-American female supervisor. Evelyn avers that there is "specific evidence of discriminatory animus in the form of a statement by Batties that she does not like black men who date white women" and such statement is "direct evidence of racially based attitudes toward Evelyn, *which is the wellspring from which all of the other hostility emanates.*" App. Br. 26, 38 (emphasis added). Indeed, Evelyn testified that he believed Batties' animus was "because I date white women" and that this was the essence of all of the conduct by Batties that he complains about. CP 2104-05. The record is devoid of evidence that Batties treated non-African-American individuals differently than Evelyn

[29] Edwards emphasizes that "the county's own investigator could not decide whether or not Nelson was motivated by race." App. Br. 24. However, that finding by Goldsmith cannot establish pretext because it is an expression about the *lack* of evidence to point to *any* particular conclusion. This is a far cry from the specific and substantial evidence required to establish pretext.

or that Evelyn was subjected to a race-based hostile work environment because he dated white women. Thus, Evelyn's WLAD claim was properly dismissed.

1. The trial court properly dismissed Evelyn's WLAD disparate treatment claim.

a. The one-time, stray comment by Batties fails to evidence discriminatory animus.

Evelyn avers that there are disputed issues of material fact regarding whether Batties subjected him to unlawful disparate treatment because Batties said one time, "[w]ell you know, I have a problem with black men that date white women."[30] CP 2102. This argument fails for many reasons.

First, it is of significant import that Evelyn admits that this was ***one, single isolated comment*** made by Batties at a lunch they were sharing with Beltran ***at some indeterminate date*** during their 20 years of working together. Evelyn testified that he recalls nothing at all about the context or content of the conversation and he concedes that this was a generalized comment not directed at him. CP 2101-03. This comment

[30] Evelyn falsely asserts that Batties made this comment in the presence of Evelyn and "another African-American officer." App. Br. 10. In fact, Evelyn was out to lunch with Batties and Beltran—a Caucasian—at the time. CP 28.

amounts to no more than a stray, offhand comment insufficient to establish pretext or actionable discriminatory animus.[31]

Second, the notion that this statement is the "wellspring" from which Evelyn's issues with Batties arose defies logic because Batties knew Evelyn had a biracial daughter for almost 20 years and had met both Evelyn's biracial daughter and her Caucasian mother as early as 1994. CP 603, 2083-84. But even with this knowledge, Batties always gave Evelyn favorable performance reviews, promoted him repeatedly and any discipline she gave him was always minor.[32] CP 584-85, 2090. Additionally, in 2005 and with knowledge for at least fifteen years that Evelyn dated white women, Batties even made Evelyn acting Assistant Chief when she went out of town, something Evelyn considered an honor.[33] CP 2092.

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[31] *Domingo, supra,* 124 Wn. App. at 87-89 (2004)(without evidence of context or manner, supervisor's comment that plaintiff was "no longer a spring chicken" failed to establish pretext or discriminatory animus since court could not determine whether comment was a joke, made in an unrelated context, or was connected to discharge in any way).

[32] Evelyn testified that he was promoted multiple times under Batties---even faster than usual for CCSO and faster than his own personal goal for promotions. *Id.*

[33] Thus, Batties had promoted Evelyn to the point where he couldn't be promoted any further without Batties leaving, hardly the conduct of someone with discriminatory intent.

Third, Evelyn is incorrect that this comment is direct evidence of discrimination on the basis of race. [34] App. Br. 28. Direct evidence is evidence "which, if believed, proves the fact [of discriminatory animus] without inference or presumption", such as clearly sexist, racist or similarly discriminatory statements by the employer. *Trans World Airlines, Inc. v. Thurston*, 469 US 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). As specified by Evelyn, his complaint about Batties had to do with "who he chooses to date". CP 658. The WLAD prohibits discrimination on the basis of numerous immutable characteristics, but only certain, specific choice-based conduct. [35] Thus, this comment is facially an expression about unprotected *conduct*, not about an immutable, protected characteristic like race. The Washington

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[34] The cases cited by Evelyn to show this statement is direct evidence of discrimination are sharply in contrast to the instant facts. In *Nichols v. Volunteers of America, N. Alabama, Inc.*, 470 Fed Appx 757 (11th Cir 2012), the court found a fact question as to whether a racially hostile work environment existed where Plaintiff testified that her superiors *regularly* used the word "nigger"; her superiors "*everyday*" talked about how "they disliked and hated black men and how black men went to white women because all black women were nasty, dumb, stupid, and worthless, and that they hated all relationships between black men and white women"; threatened a Caucasian employee's daughter " that if she ever even got close to a 'nigger man', they did not know what they would do"; and referred to individuals as "nigger lovers." *Id.* at 760-61. *Doxie v. Volunteers of America, Southeast, Inc.*, 37 F Supp 3d 1215 (ND Ala 2014), involves the same alleged wrongdoers and the same horrific racial slurs as Nichols, only after VOA, Southeast took over VOA, N. Alabama. *Id.* at 1220. The one-time, ambiguous comment by Batties pales in comparison.

[35] For instance, the WLAD prohibits discrimination on the basis of martial status, creed (religion) and honorably discharged veteran status, all of which involve invoking a choice. RCW 49.60.180.

legislature has chosen not to protect the choice inherent in dating or to protect "associational discrimination." CP 174-176; 1922-1924.

Fourth, contrary to Evelyn's representation, the County never argued below that Batties "*could not have* discriminated against him" because they are the same race. App. Br. 26 (emphasis added). [36] Rather, the County argued that "absent any other exacerbating evidence, there is a fundamental disconnect for Evelyn's suggestion of racially discriminatory animus". CP 169. Thus, the County merely argued the common sense maxim that individuals of the same race are less likely to discriminate against each other on the basis of race. [37]

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[36] Evelyn further alleges "[t]he County does not deny that Evelyn was repeatedly reprimanded, scolded, disciplined and ultimately terminated because he was viewed as combative and disrespectful by Batties." App. Br. 26. Indeed, the County does deny and always had denied this. Although Evelyn was given minor discipline a few times in his 20-year career for his disrespectful, insubordinate conduct towards Batties, such instances were sporadic. Moreover and significantly, **Batties was not the decision maker on Evelyn's discharge** as Evelyn alleges. Sheriff Garry Lucas was the decision-maker on Evelyn's termination. CP 235, 968-69. Thus, beginning with Issue #3 of Evelyn's "Issues Related to Assignments of Error" and throughout, the briefing incorrectly identifies Batties as the "ultimate decision maker" on Evelyn's termination. Finally, it is undisputed that Evelyn was terminated for sexually harassing numerous female contractors in violation of applicable rules and policies and Evelyn testified that this is the only reason the County ever gave for his discharge. CP 619, 908, 968-69. The suggestion that Evelyn was terminated because he was viewed as combative and disrespectful by Batties is pure fabrication.

[37] Legal support for the notion that same-race discrimination is less likely can be found in the Fourteenth Amendment and its application to unconstitutional "jury packing". The premise that underlies cases recognizing that a criminal defendant has a right under the Fourteenth Amendment not to have members of his own race or characteristic class excluded from jury service is that individuals are less likely to discriminate against those who share their own identifiable attributes. Thus, discriminatory exclusion of members of a defendant's race has been viewed as unfairly

[Footnote continued on next page]

b. The record is devoid of evidence that either Batties or the County treated Evelyn differently because he chose to date white women.

As set forth above, Evelyn's alleged "wellspring" of Batties' discriminatory animus is, in reality, no more than a dry creek bed. Moreover, Evelyn's disparate treatment allegations similarly run dry.

To prove unlawful disparate treatment, Evelyn must prove that the County treated him less favorably than others *because of* his race *and* that his race *actually motivated* the County's decisions. *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. at 1948 (2012) (emphasis added), citing *Hegwine v. Longview Fibre Co., Inc.,* 162 Wn.2d 340, 354 n. 7, 172 P.3d 688 (2007). Discriminatory motive cannot be divined by comparing individual decisions about dissimilar employment circumstances. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410 (9th Cir. 1987). To defeat summary judgment, Evelyn must advance specific facts *admissible in evidence* sufficient that a reasonable juror could

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excluding persons who may be inclined to favor the defendant. *Batson v. Kentucky*, 476 U.S. 79, 99, 106 S. Ct. 1712, (1986) (holding that practice of exercising preemptory challenges against black jurors because of their race discriminates against black defendants in criminal cases); *State v. Saintcalle*, 178 Wash. 2d 34, 41, 309 P.3d 326, *cert. denied*, 134 S. Ct. 831 (2013) ("It is crucial that we have meaningful and effective procedures for identifying racially motivated juror challenges because racial discrimination in selection of jurors harms...the accused whose life or liberty they are summoned to try.")(internal quotation omitted)

conclude in favor of the non-moving party. Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient. *Grimwood, supra,* 110 Wn. 2d at 359 (1988). *Id.* Evelyn's evidence fails to meet these exacting standards.

Evelyn proffers no more than conclusory, unsupported or debunked allegations that he was treated differently by Batties because he dates white women. Evelyn cites to the 2008 investigation into his complaint about Batties in support. However, that investigation found "there is no evidence that Batties discriminates against Evelyn because he dates white women." CP 1651. Further, Evelyn cites *only* to his own, self-serving declaration for support that "Batties was constantly questioning and undermining him, when she did not do so to others." App. Br. 30. But in fact, the investigation report and other record evidence establish that *it was Evelyn who disrespected and undermined Batties.* The other Custody Commanders told the investigator that "Evelyn needs to acknowledge that Batties is the boss" and that Evelyn "does not like to be told what to do and jumps to conclusions quickly." CP 1651. One commander said that Evelyn treated Batties so poorly that "if [Evelyn] was in the private sector, he wouldn't even have a job". [38] CP 1372.

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[38] Evelyn misstates the record in arguing that "[a] Caucasian commander admitted to saying something racially inappropriate, but Batties did not

[Footnote continued on next page]

In reality, as conceded by Evelyn, "Batties frequently complained that Evelyn was not showing her proper respect." App. Br. 30. Pandora Pierce, a witness for Evelyn below, testified that "[i]n all the years I have known Cliff Evelyn, I have never heard him make an improper sexual statement or treat any woman with disrespect, *with the exception of Chief Batties who he would argue with about how things were being done and what could be done to make them better.*" CP 1085. (emphasis added). The record exhaustively documents and reflects that Evelyn was rude to Batties, cursed at her, argued with her, was too loud

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submit the incident for formal investigation." App. Br. 30. This refers to a misunderstanding between Custody Officer Lemar Elliott ("Elliott") and Commander Mike Anderson ("Anderson") about Elliott wearing his uniform off-duty to a school function. CP 604-06, 975-76. Evelyn lacks personal knowledge about what happened. CP 606. Notably, there is no evidence that "something racially inappropriate" was said, Elliott himself did not believe that there was anything racial about this incident and he only complained because Evelyn pushed him to. CP 976. Curtis' investigation found that Evelyn's email to Batties about this "was very direct and could easily have been interpreted as showing disrespect for her and her position" and "Batties' corrective counseling memo was a result of her growing frustration with Evelyn." CP 662.

The Custody commanders generally felt that Batties treated Anderson--**not** "Caucasian commanders"-- better than other commanders. CP 1651. However, Batties and Anderson were friends for over 30 years and she had a different level of trust and comfort with him. CP 1480, 2221. To the extent that Batties treated Anderson better than Evelyn, that was because Anderson was respectful to Batties whereas Evelyn was frequently rude, disrespectful and insubordinate to her. CP 2221.

and direct and was generally not respectful of her position or office. CP 995-96, 998.

Evelyn also attempts to demonstrate disparate treatment by Batties via the declaration of Gerald Haynes ("Haynes"). App. Br. 30-31. However, Evelyn proffers no *admissible* evidence and his attempt fails. Haynes' testimony that "he knew Batties disfavored African-American men who were involved in relationships with Caucasians", his "conclusion" that Evelyn was targeted by Batties, and statement that a "race-based double standard" existed are no more than inadmissible conclusory statements of fact imbued with hearsay and lacking foundation CP 1080-1081.[39]

The remainder of Evelyn's evidence is similarly flawed. Evelyn avers that Batties "orchestrated the complaint of harassment" that led to his discharge. App. Br. 31. In so arguing, Evelyn falsely contends that "Batties met privately with the complainant who then rewrote her complaint to include lewd and offensive statements." (*Id.*). In reality, the referenced complaint against Evelyn was made on September 25, 2008, but Batties did not meet with the complainant until September 30, 2008—five days after the complaint. CP 1485, 1486. Further, Evelyn claims that

[39] The County moved to strike the cited Haynes testimony below. CP 2246-47. The trial court denied the motion. CP 2286.

Batties' comment about interracial dating "should have been formally investigated, but it was not." App. Br. 30. Yet on the very same page, Evelyn cites to the Curtis investigation report where it was found "there is no evidence that Batties discriminates against Evelyn because he dates white women." *Id.*; CP 1651.

Evelyn attempts to more broadly ascribe disparate treatment to the County via his own declaration. CP 1054. However, his vague and ambiguous testimony regarding Chief Wentworth and some unspecified Custody Officer lacks foundation, is inadmissible and fails to aid him. [40] Moreover, as a Chief and a Custody Officer, neither of these alleged individuals is similarly situated with Evelyn, a Commander, and thus cannot be a valid comparator to create an inference of discrimination. [41] *Aragon v. Republic Silver State Disposal, Inc.* 292 F.3d at 660 (9th Cir.2002)(plaintiff must prove that he and the alleged comparator outside his protected class were "similarly situated in all materials respects.")

Evelyn also attempts to show disparate treatment using Commander Don Polen ("Polen") as a comparator, claiming that despite

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[40] The County moved to strike this testimony below. CP 2245. The trial court denied the motion. CP 2286.

[41] In his brief, Evelyn deceptively refers to the unspecified Custody Officer as a "Caucasian commander."

sex-related issues, Polen was allowed to retire with full benefits rather than be discharged. App. Br. 32; CP 1054. In reality, Evelyn's misconduct was much more extensive than Polen's and Evelyn was actually treated *better* than Polen.[42]CP 2164-65. Whereas Polen chose to retire in lieu of discharge (without any additional benefits offered), Evelyn chose to reject the enhanced resignation agreement the County offered him, resulting in his discharge. *Id.*

Finally, Evelyn avers that Arata's investigation into the sexual harassment complaints made against him evidences disparate treatment. Evelyn is incorrect for a number of reasons.

First, Arata's investigation into the complaints against Evelyn cannot establish disparate treatment because there is no record evidence demonstrating that Arata or any other investigator at CCSO ever handled any investigation differently. Although Evelyn challenges the investigation as "biased", there is simply no evidence showing that an allegedly "unbiased" investigation would have been any different. [43]

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[42] Polen was allowed to retire immediately in lieu of discharge. Contrastingly, Evelyn was offered to remain employed until he reached his 20-year service mark before resignation—an enhanced benefit to Evelyn's pension not offered to Polen. CP 220, 2165.

[43] Evelyn argued below that in a "neutral investigation," Arata would have explored the possibility that the female Wexford employees engaged in a conspiracy against him to get him fired in order to protect Wexford's contract with the County because Evelyn had been critical of Wexford's performance. CP 1145-46. However,

[Footnote continued on next page]

Second, no reasonable juror would believe that Arata's investigation was improperly influenced by discriminatory intent because Arata was a fairly new employee at the time of the investigation and she and Evelyn hardly knew each other; Evelyn admits that Arata never made any racial comments to him or around him and that he and Arata never had any significant disputes or issues between them; and in his deposition, Evelyn did not even identify Arata as one of the individuals whom he believes discriminated against him. CP 2086-87, 2106.

Third, any inference of alleged discriminatory intent by Arata is defeated by the fact that Arata not only agreed to conduct all seventeen (17) interviews requested by Evelyn "[o]ut of fairness to Commander Evelyn", Arata affirmatively solicited that information. CP 671-672.

Fourth, Evelyn's allegations merely challenge the quality of Arata's investigation. But it is insufficient to establish pretext to merely present evidence that the investigation was imperfect, incomplete, or arrived at a possibly incorrect conclusion because doing so merely

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Arata indisputably *did* explore that possibility and rejected it expressly in her report, finding that some of the Wexford complainants no longer worked for Wexford, some had never worked at CCSO at the same time, and some had patently negative things to say about Wexford. CP 908. Further, the Wexford employees denied any such conspiracy. CP 2237, 2232, 2228.

challenges the soundness of Sheriff Lucas' decision to terminate Evelyn. Rather, Evelyn must present evidence that the County did not, in good faith, believe the findings of the investigation. *Domingo*, *supra*, 124 Wn. App. at 88-89 (2004).[44] The record is devoid of any such evidence.

Moreover, Evelyn's challenge to the quality of Arata's investigation is merely an invitation for the court to act as a "super-personnel department" and micromanage and second-guess the investigation. Because doing so would have the chilling effect of discouraging investigation of employee complaints prior to assessing discipline, the Washington Supreme Court and courts around the country consistently reject such invitations. *White v. State*, 131 Wn. 2d 1, 19-20 (1997).[45] [46]

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[44] *See also Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 489 (5th Cir. 2004) (it is 'not sufficient [for the plaintiff] to present evidence that the ... investigation was imperfect, incomplete, or arrived at a possibly incorrect conclusion. He must show that the reason proffered by [the defendant] is 'false, and discrimination was the real reason.'"); *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997)(question is "not whether the employer's reasons for a decision are '*right* but whether the employer's description of its reasons is *honest.*'; "a reason honestly described but poorly founded is not a pretext as that term is used in the law of discrimination.").

[45] The *White* court held, "[s]ubjecting each disciplinary decision of an employer to the scrutiny of the judiciary would not strike the proper balance between the employer's right to run his business as he sees fit and the employee's right to job security. This is particularly true in instances like this one where an employee's rights are already protected by civil service rule, by a collective bargaining agreement, and by civil rights statutes." Similar to the plaintiff in *White*, Evelyn also had had civil service rules, a collective bargaining agreement, and civil rights statutes protecting his employment.

Arata conducted a thorough, comprehensive investigation. Based on her findings, CCSO made a reasonably informed and considered decision to discharge Evelyn. There is an abundance of credible evidence supporting that decision. CP 904-909, 934-36, 2231-2233, 2235-37, 2226-29). Even if Arata's investigation was not perfect, Evelyn proffers no evidence beyond inadmissible speculation and conclusory statements that CCSO's reason for discharging him is unworthy of belief and he fails to establish pretext.[47]

There is no admissible evidence in the record that either Batties or the County treated Evelyn differently at all, much less because he dated white women. The weight of the credible record evidence reflects that Evelyn's issues with Batties resulted from a long history of abuse and disrespect *by Evelyn towards Batties*. Evelyn's WLAD disparate treatment claim was properly dismissed.

[Continued from previous page]

[46] *See e.g., Fragante v. City & Cnty. of Honolulu,* 888 F.2d 591, 598 (9th Cir. 1989) ("[t]he process may not have been perfect, but it reveals no discriminatory motive or intent."); *Baldwin v. Blue Cross/Blue Shield of Alabama,* 480 F.3d 1287, 1303-05 (11th Cir. 2007) (second-guessing investigations puts courts "in the business of supervising internal investigations"; court's role is not to micromanage internal investigations); *Smith v. Chrysler Corp*, 155 F.3d 799, 807 (6th Cir. 1998) ("we do not require that the decisional process used by the employer be optimal or that it left no stone unturned"); M*ichael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 598-99 (6th Cir. 2007) (disagreement with investigation results insufficient to defeat summary judgment).

[47] Evelyn and Edwards misstate the facts in numerous respects throughout their opening brief. In addition to specifics identified herein, see Ex E.

2. The trial court properly dismissed Evelyn's WLAD hostile work environment claim.

To establish a racially hostile work environment, a plaintiff must prove: (1) the harassment was unwelcome; (2) the harassment was because of [race]; (3) the harassment affected the terms or conditions of employment, and (4) the harassment is imputed to the employer. *DeWater v. State*, 130 Wn. 2d 128, 135, 921 P.2d 1059 (1996), citing *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985). To determine whether the harassment affects employment terms and conditions, courts consider: (1) the frequency and severity of the discriminatory conduct; (2) whether it is physically threatening or humiliating or a mere offensive utterance; and (3) whether it unreasonably interferes with an employee's work performance. *Washington v. Boeing Co.*, 105 Wn. App. 1, 10, 19 P.3d 1041 (2000). Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law. *Id.* To survive a motion for summary judgment, a hostile work environment plaintiff "must do more than express an opinion or make conclusory statements." *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). Evelyn proffers no more than isolated, trivial

incidents in support and cannot satisfy the second or third elements of a racially hostile work environment claim.

According to Evelyn, the totality of his alleged racially hostile work environment includes:

> (1) Inmates allegedly called "Evelyn 'nigger' in front of Caucasian commanders, but they would laugh and refused to correct inmates";
>
> (2) Plaintiff Easterly one time found a racially offensive picture ("Dove incident");
>
> (3) Evelyn made a "policy decision" and Batties "attacked him" rather than support him ("Clark incident");
>
> (4) Batties allowed a "baseless criminal assault charge" against Evelyn to advance ("Vosburg incident");
>
> (5) Batties did not properly handle a complaint by a black Custody Officer ("Elliott incident");
>
> (6) Batties said she has an issue with black men that date white women; and
>
> (7) Evelyn was discharged for an allegedly biased sexual harassment investigation by Arata. App. Br. 9-13.

Evelyn's allegations fail to establish a workplace that a reasonable juror would find objectively offensive and his claim fails.

First, Evelyn's most salacious allegation regarding inmates' use of the term "nigger" fails to aid Evelyn because, quite simply, it is untrue. There is no evidence in the record that "inmates called Evelyn 'nigger' in front of Caucasian commanders, but they would laugh and refused to correct inmates." Evelyn's citations to the record confirm

this falsity.[48] Rather, Evelyn testified that although he did at times hear inmates yell out "nigger" from their cells, he never knew who said it or where it was coming from. CP 1685. Evelyn testified that in his 20-year career at CCSO, there was only *one time* that an inmate directly used a racial slur towards him. In response, Evelyn infracted the inmate and put him in the "hole". *Id.*

Evelyn's allegations about inmate misconduct further fail to support his hostile environment claim because of the unique nature of the circumstances. The Ninth Circuit has noted that prisoners, by definition, have breached prevailing societal norms in fundamentally corrosive ways. By choosing to work in a prison, corrections personnel acknowledged and accepted the probability they will face inappropriate and socially deviant behavior. *Freitag v. Ayers*, 468 F.3d 528, 538 (9th Cir. 2006). Under such circumstance, the most that can be reasonably expected is for a jail "to implement and enforce policies reasonably

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[48] Evelyn cites to CP 1686 in support. However, CP 1686 is Evelyn's deposition testimony wherein he testified: (1) this allegation never happened to him; (2) he has only heard about such inmate misconduct from Haynes; (3) he has no knowledge of the circumstances surrounding the alleged laughter by white officers or whether they were laughing at a joke; and (4) he is merely speculating that it "seems like" there was a connection between the inmates' use of the word "nigger" and the alleged laughter. Such evidence is inadmissible hearsay and speculation that cannot support Evelyn's claim. Moreover, the suggestions that "Caucasian *commanders*" "refused to correct the inmates" are both fabrications lacking any support in the record.

calculated to minimize such harassment and protect the safety of its employees." *Id.* at 539. [49] It is undisputed that CCSO's Inmate Handbook prohibits inmates' use of the word "nigger" and inmates have been disciplined for such misconduct numerous times. [50]

Second, the Dove incident where a racially inappropriate picture was posted in the jail is not properly considerable as part of Evelyn's hostile work environment claim because it is not evidence brought to the trial court's attention as part of Evelyn's hostile work environment claim below.[51] RAP 9.12; *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wash. App. 52, 80-81, 322 P.3d 6, 21 (2014).

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[49] *Freitag* is instructive by contrast. In that case, a female officer alleged that she was subjected to a hostile work environment because of her sex. She was repeatedly subjected to exhibitionist masturbation — directed at her — by male inmates. Further, her supervisor specifically instructed her not to document those incidents and allegedly retaliated against for her insistence that such incidents be documented. The conduct that Evelyn complains of is a far cry from the misconduct in *Freitag*.

[50] CCSO's Inmate Handbook regulates inmate conduct and considers "harassment" to be a "Major Violation" with concomitant severe possible sanctions, including loss of "good time", "lock down", loss of visiting privileges, and loss of commissary, recreation, library and other programs. CP 218-19, 267. There have been many instances at CCSO where an inmate was infracted for the use of the word "nigger", including where white officers infracted inmates for using the term towards black officers. CP 2205-2215. Of course, common sense dictates that it is impossible to infract an unknown inmate who may scream slurs from an unidentified cell.

[51] Even were this evidence considerable, the circumstances surrounding the Dove incident reflect that the County promptly conducted an investigation upon learning about the picture; determined that it was Custody Officer Jeff Dove who posted the picture; disciplined Dove; and then went to arbitration to enforce the discipline when the union grieved the discipline imposed. CP 40-41. The County's response to the incident was "textbook".

Third, the Clark incident was simply a minor dispute Evelyn had with Batties where Evelyn ultimately disrespected Batties. Evelyn and Corrections Manager Pam Clark ("Clark") became engaged in a dispute when Evelyn, without approval from CCSO, refused to replace an employee badge for one of Clark's employees. CP 979-980. Both Evelyn and Clark asked Batties to intercede and, as usual, Evelyn became loud, hostile, abrasive and condescending to Batties.[52] CP 995-96. This incident lacks any inference related to Evelyn's interracial dating and no reasonable juror could find this evidence suggests a pretext for race discrimination.

Fourth, the Vosberg incident is similarly hollow evidence in support and was not a "baseless criminal assault charge" as Evelyn alleges. Rather, Evelyn testified that he tripped and grabbed Vosburg from behind; Vosburg was shocked and startled; and that this was an unwanted touching that was properly considered a "major complaint." CP 599-601. Vosburg filed a complaint against Evelyn indicating that she wanted to file criminal assault charges against him, so Batties referred the complaint to Internal Affairs for investigation. CP 637-39, 642. Batties exonerated Evelyn one week later. *Id.* Confirming the baseless nature of this

[52] Batties was so upset by Evelyn's insubordinate, disrespectful conduct that she took a week off after the Clark incident. CP 1369.

allegation, Evelyn testified that he does not consider the Vosburg incident or the way it was handled to be evidence of race discrimination. CP 602.

Fifth, Evelyn's proffered evidence about the Elliot incident is inadmissible hearsay incapable of supporting his claim. CP 606. Further, the Elliott incident, like the Clark incident, was simply a minor dispute between Evelyn and Batties where Evelyn, as usual, ultimately disrespected Batties. This incident arose from a simple misunderstanding between Elliott and Anderson about Elliott wearing his uniform off-duty to a school function. *See* fn 38, *supra*. Elliott himself did not believe that there was anything racial about this incident and he only complained because Evelyn pushed him to. CP 976. Evelyn was unhappy that Batties told Elliott to speak with Anderson directly, but Evelyn told Elliott to do the exact same thing. CP 604. Evelyn blasted Batties' handling of the situation in a letter and testified that he understands how Batties could have viewed his actions as disrespecting Batties and her position. CP 610, 648.

Sixth and **Seventh**, the stray, offensive utterance by Batties and the Arata investigation fail to evidence any inference of discriminatory animus as set forth in Section C(1)(b), *supra*, and thus fail to support Evelyn's hostile work environment claim.

The record clearly establishes that Evelyn's complaints about Batties amount to no more than personality clashes and gripes about how his supervisor did her job. However, personality conflicts between superiors and subordinates or a subordinate's disagreement with his supervisor's exercise of duties do not give rise to a reasonable inference of discrimination. *Parsons v. St. Joseph's Hosp. & Health Care Ctr.*, 70 Wn. App. 804, 811, 856 P.2d 702 (1993). [53] Moreover, the WLAD is not a general civility code and not everything that makes an employee unhappy is an actionable adverse employment action. *Adams v. Able Building Supply*, 114 Wn. App. 291, 297, 57 P. 3d 280 (2002).

Evelyn fails to proffer the admissible, specific and substantial evidence required to establish a racially hostile work environment and show that the County's reasons for its action were a pretext for discrimination. Rather, he only proffers weak, conclusory statements of opinion about trivial, isolated disputes he had with his supervisor—disputes that Evelyn himself created by his disrespectful, insubordinate conduct. The few, minor incidents relied on by Evelyn lack

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[53] *See also Smith v. Kmart Corp.*, 1996 WL 780490 (E.D. Wash. 1996) (although plaintiff perceived work environment to be hostile, perception derived principally from the personal antipathy and antagonistic relationship between plaintiff and her manager, not age animus)(Ex D); *Dehal v. U.S. Postal Serv.*, 859 F.2d 154 (9th Cir. 1988) (personality conflict between plaintiff and his immediate supervisor was beyond the scope of Title VII).

the frequency or severity to affect the terms and conditions of his employment and there is no credible record evidence that these minor disputes arose *because of* Evelyn's choice to date white women. *DeWater v. State*, 130 Wn. 2d at 135. The trial court properly dismissed Evelyn's WLAD hostile work environment claim.[54]

IV. CONCLUSION

Based on the foregoing, the trial court properly granted summary judgment on Evelyn and Edwards' WLAD claims because they failed to proffer evidence to either support a prima facie case and/or establish pretext. There are no material facts in dispute and this Court should affirm.

RESPECTFULLY SUBMITTED this 23rd day of October, 2015.

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[54] Evelyn and Edwards argue that their claims are not barred by the applicable statutes of limitations. App. Br. 38-39. However, the trial court ruled that "[t]he materials presented by the plaintiffs in opposition to the defendant's motion should not be partially stricken, and were fully considered by the court." CP 2285. Thus, there is no statute of limitations issue before the Court and no response is required.

RCW 43.101.021

Policy.

It is the policy of the state of Washington that all commissioned, appointed, and elected law enforcement personnel comply with their oath of office and agency policies regarding the duty to be truthful and honest in the conduct of their official business.

[2010 c 294 § 1.]

RCW 49.44.120

Requiring lie detector tests — Penalty.

(1) It shall be unlawful for any person, firm, corporation or the state of Washington, its political subdivisions or municipal corporations to require, directly or indirectly, that any employee or prospective employee take or be subjected to any lie detector or similar tests as a condition of employment or continued employment: PROVIDED, That this section shall not apply to persons making application for employment with any law enforcement agency or with the juvenile court services agency of any county, or to persons returning after a break of more than twenty-four consecutive months in service as a fully commissioned law enforcement officer: PROVIDED FURTHER, That this section shall not apply to either the initial application for employment or continued employment of persons who manufacture, distribute, or dispense controlled substances as defined in chapter **69.50** RCW, or to persons in sensitive positions directly involving national security.

(2) Nothing in this section shall be construed to prohibit the use of psychological tests as defined in RCW **18.83.010**.

(3) Any person violating this section is guilty of a misdemeanor.

(4) As used in this section, "person" includes any individual, firm, corporation, or agency or political subdivision of the state.

(5) Nothing in this section may be construed as limiting any statutory or common law rights of any person illegally denied employment or continued employment under this section for purposes of any civil action or injunctive relief.

[2007 c 14 § 1; 2005 c 265 § 1; 2003 c 53 § 278; 1985 c 426 § 1; 1973 c 145 § 1; 1965 c 152 § 1.]

Notes:

Intent -- Effective date -- 2003 c 53: See notes following RCW **2.48.180**.

RCW 9a.56.040

Theft in the second degree.

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW **9.41.010** or a motor vehicle;

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant;

(c) Commercial metal property, nonferrous metal property, or private metal property, as those terms are defined in RCW **19.290.010**, and the costs of the damage to the owner's property exceed seven hundred fifty dollars but does not exceed five thousand dollars in value; or

(d) An access device.

(2) Theft in the second degree is a class C felony.

[2013 c 322 § 3; 2012 c 233 § 3; 2009 c 431 § 8; 2007 c 199 § 4; 1995 c 129 § 12 (Initiative Measure No. 159); 1994 sp.s. c 7 § 433; 1987 c 140 § 2; 1982 1st ex.s. c 47 § 15; 1975 1st ex.s. c 260 §**9A.56.040** .]

Notes:

Applicability -- 2009 c 431: See note following RCW **4.24.230**.

Findings -- Intent -- Short title -- 2007 c 199: See notes following RCW **9A.56.065**.

Findings and intent -- Short title -- Severability -- Captions not law -- 1995 c 129: See notes following RCW **9.94A.510**.

Finding -- Intent -- Severability -- 1994 sp.s. c 7: See notes following RCW **43.70.540**.

Effective date -- 1994 sp.s. c 7 §§ 401-410, 413-416, 418-437, and 439-460: See note following RCW **9.41.010**.

Severability -- 1982 1st ex.s. c 47: See note following RCW **9.41.190**.

Civil action for shoplifting by adults, minors: RCW **4.24.230**.

Exhibit C
Page 1 of 2

Property crime database, liability: RCW **4.24.340**.

1996 WL 780490
Only the Westlaw citation is currently available.
United States District Court, E.D. Washington.

Barbara SMITH, and Raymond Smith, Plaintiffs,
v.
KMART CORPORATION, Defendant.

No. CS-95-248-RHW. | Dec. 18, 1996.

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MEMORANDUM OPINION AND ORDER

WHALEY, District Judge.

*1 A bench trial was held between November 4-6, 1996. Bernard McNallen and Frank King appeared on behalf of Plaintiffs. David Riewald appeared on behalf of Defendant. The focus of the trial was Plaintiffs' claim that Plaintiff Barbara Smith was subjected to age-based harassment by a fellow employee while employed at Defendant Kmart.[1]Plaintiffs, Ms. Smith and her husband, seek compensatory and punitive damages for alleged violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621*et seq.*, the Washington Law Against Discrimination, Wash. Rev. Code Ch. 49.60, and the torts of negligent supervision and negligent retention.

I. FINDINGS OF FACT

1. Defendant Kmart operates retail stores throughout the United States. Prior to April 1994, each Kmart store was divided into two departments: a Hardlines Department and a Fashions Department.

2. At all times relevant to this action, the Kmart store in Veradale, Washington ("Veradale Kmart") was managed by the same Store Manager ("Store Manager"). The Store Manager had overall responsibility for store operations and supervised all store departments and personnel, except for the Fashions Department. Although the Fashions Department was not under the Store Manager's direct supervision, he was responsible for ensuring the Fashions Department operated within Kmart's general operational guidelines and policies (*e.g.*, refund policies, stockroom and inventory management, store security, *etc.*). In this capacity, the Store Manager had occasional meetings with Smith to review and criticize her compliance with these policies.

3. The Store Manager's immediate supervisor was the District Manager for the region in which the Veradale Kmart was located. The following persons held that position during the period relevant to this case: Greg Morck ("Morck" -- 1989 until May, 1993); Brad Johnson ("Johnson" -- May, 1993 until February, 1994); and, John Boes ("Boes" -- February, 1994 until present). During their tenure, these supervisors performed regular appraisals of the Store Manager's performance and consistently evaluated his work as satisfactory or better.

4. Plaintiff Barbara Smith ("Smith") began employment with Kmart in 1977 and joined the Veradale Kmart in March, 1989, as Manager of the Fashions Department. Smith was born on September 13, 1939 and, thus, was 49 years old when she began working at the Veradale Kmart.

5. When Smith joined the Veradale Kmart the Fashions Departments in Kmart stores were essentially autonomous stores within the larger stores, with the exception of the areas of overlap discussed *infra* in Finding #2. Smith was entitled to maintain complete control over the Veradale Kmart's Fashions Department without oversight by the Store Manager, including operating under her own budget, making out her own work schedule, and hiring, firing and supervising her subordinates. Smith was not part of the overall store management team and was not required to open or close the store or engage in similar store management tasks.

*2 6. As Fashions Manager, Smith's immediate supervisor was the District Fashions Manager for the Kmart district containing the Veradale Kmart. During Smith's tenure Leroy Collyear ("Collyear") held that position from shortly after her arrival until the fall of 1990. Collyear was replaced by Tom Martin ("Martin"), who remained Smith's supervisor until her departure.

7. A contentious relationship between the Store Manager and Smith developed shortly after her arrival at the Veradale Kmart and continued until she left. The

antagonism between Smith and the Store Manager was expressed on occasion by loud verbal arguments and "shouting matches." The principal causes of friction leading to these outbursts was the overlap in their areas of supervisory responsibility and the Store Manager's abrasive management style.

8. The Store Manager made frequent age-related remarks to Smith and other employees during her tenure at the Veradale Kmart, including the following comments made in the presence of Smith and other employees:

a. Telling Smith in late 1993 that "he knows you're a senior citizen also" after an employee of a restaurant located in the Veradale Kmart offered Smith a senior citizen's discount on a purchase;

b. Telling Smith that "I'm never going to get your age" when she would tell him that "you're going to get my age some day" after he made age-related comments;

c. Describing Smith in early 1994 as an "antique" after she described an obsolete piece of store equipment as an antique;

d. Telling an employee during a February/March, 1994, inventory check to "write these [drapery hooks] off, they're as old as [Smith]."

9. Although Smith sometimes traded barbs with the Store Manager, including age remarks, the Store Manager's age-related comments were viewed by Smith as unwelcome and offensive. Virtually all other employees, however, perceived these and similar age comments as light hearted teasing.

10. The Store Manager also made non-age-related derogatory comments to or about Smith in her presence. These comments were motivated by the personal animus between the Store Manager and Smith, not by age bias. These comments included:

a. A statement to Smith that "that's the biggest thing you'll ever lick" while Smith was licking a stamp to place it on an envelope;

b. An irate "where the fuck [were] you, you made an idiot of me, you made a fool of me" in May, 1992, when Smith failed to respond to a store page calling her to attend a prearranged meeting with the parents of a former employee whom the Store Manager had terminated.

These comments were also viewed by Smith as unwelcome and offensive.

11. Smith's age was a determining and substantial factor in the Store Manager's comments that expressly referred to her age in that she would not have been subjected to those comments but for her age. Age did not play a determining or substantial role in Store Manager's other derogatory comments or in creating the general state of personal animosity that existed between Smith and the Store Manager.

*3 12. Smith perceived her environment to be hostile and intolerable. Smith would not have perceived her environment as hostile and intolerable absent the underlying hostility between Smith and the Store Manager and the comments that did not expressly refer to age. The age comments were, however, a substantial factor in her perception of her work environment as hostile and intolerable.

13. The Store Manager's age comments and related conduct were not so severe that a reasonable person of Smith's age would have found the work environment hostile, abusive or intolerable.

14. Smith's relationship with the Store Manager affected her physically and emotionally. The stress resulting from their conflict aggravated a preexisting ulcer condition, requiring medical treatment in the spring of 1993. By the fall of 1993, Smith was also receiving medical treatment for headaches and pain in her shoulders, neck and knees that were at least in part due to stress. Smith also withdrew emotionally from her friends and husband during this time. Smith's doctor recommended a thirty day medical leave from work in early April, 1994, and by late May, 1994, after she had resigned from Kmart, Smith's condition had improved significantly.

15. On numerous occasions between 1989 and late March, 1994, Smith complained about the Store Manager to her supervisors or to the Store Manager's supervisors. The focus of her complaints was the Store Manager's intrusion into Fashions Department matters and his loud and abrasive management style and language. On none of these occasions did she complain about age remarks or that she was being harassed because of her age.

16. As a result of Smith's complaints, the Store Manager was counseled by his supervisors on at least four occasions: twice by Morck, once by Johnson, and once by Boes. At these sessions, the Store Manager was advised that his abrasive management style was inappropriate and that coarse language would not be tolerated. None of the sessions resulted in an official reprimand or disciplinary measures.

17. On February 9, 1994, Smith and the Store Manager drove together from Spokane to Post Falls, Idaho, where they and other Kmart managers from the region were informed that Kmart was going to implement a major, nationwide reorganization of its stores known as the Store Organizational Renewal Support ("Stores") Project in April, 1994. At that meeting, the following changes in store operations resulting from the Stores Project were discussed:

a. The Fashions Department was to be changed to Softlines Department and the Fashions Manager position was to be changed to Softlines Manager.

b. The Fashions Manager, as Softlines Manager, would be considered a member of the overall store management team and would report directly to, and be supervised by, the Store Manager for their store;

c. Softlines Managers would not retain the authority to hire and fire their subordinates and would be responsible for performing all aspects of managing the entire store, including opening and closing the store and being placed on a rotation such that they no longer could determine their own work schedule.

*4 Although this was the first time that Smith was formally told of the Stores Project, she and other Kmart employees had been privy to rumors imparting its essential features for at least several months prior to the formal meeting.

18. On Friday, March 25, 1994, the Store Manager provided his supervisor with recommendations for the new post-Stores Project manager positions in the Veradale Kmart. The Store Manager picked Smith to be the new Softlines Manager because she was the most qualified candidate.

19. Later on Friday, March 25, 1994, two of Smith's subordinates complained to the Store Manager about Smith. When the Store Manager and the store's personnel manager met with Smith to make her aware of those complaints, Smith threatened to quit because the Store Manager refused to identify the persons who raised the complaints. Smith then left the Veradale Kmart and went to a nearby Kmart store where the offices of Boes and Martin were located. Smith complained to both Martin and Boes about the Store Manager's "abusive" and "macho" management style but did not specifically mention age harassment. Smith also complained about the changes in her duties and schedule relating to the impending implementation of the Stores project and of her reluctance to work directly under the Store Manager. Boes told her he would talk to the Store Manager regarding her complaints, but that she needed to adapt to the changing situation at the Veradale Kmart and learn to work with the Store Manager despite their past relationship since he would soon be her supervisor.

20. On Monday, March 28, 1994, Smith called in sick. On Tuesday, March 29, 1994, Smith began what became a sixty day leave of absence from work.

21. On May 18, 1994, Smith resigned her employment with Kmart, effective May 27, 1994. Smith's resignation letter cited the "belligerence" of the Store Manager and the failure of Kmart management to address her complaints as the reasons for her departure but did not mention having been subjected to age harassment. Smith was 55 years old at the time of her resignation.

22. Smith resigned from Kmart because of her antagonistic relationship with the Store Manager and because the advent of the Stores Project meant that she would be directly supervised by him. Age harassment was a factor, but did not play a substantial or determining role in her decision to quit.

23. Patrick Carroll, a person substantially younger than Smith replaced her as the new Softlines Manager at the Veradale Kmart Store, which had implemented the Stores Project reorganization in her absence.

24. During her tenure as Fashions Manager at the Veradale Kmart, Smith's performance was evaluated by her direct supervisor on an annual basis. Her performance appraisals and the testimony of her supervisors indicated that Smith performed her duties in a satisfactory or better manner at all times material to this case.

25. On March 3, 1995, Smith filed a charge with the Equal Employment Opportunity Commission that alleged she had been subjected to age harassment while at the Veradale Kmart and that she was forced to resign because of health problems caused by that harassment. In the concluding paragraph, Smith charged Kmart with unlawful discrimination by failing to maintain a harassment free work place and by compelling her constructive discharge.

*5 To the extent that any of the foregoing findings of fact state conclusions of law, they are adopted herein as conclusions of law.

II. AGE DISCRIMINATION

A. Overview

1. Age Discrimination in Employment Act ("ADEA")
The ADEA prohibits an employer from discriminating against its employees because of their age. Specifically, the ADEA states:

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. § 623(a).

The ADEA's substantive prohibitions are modeled on those of 42 U.S.C. § 2000e-2 ("Title VII"). Because of this relationship, the substantive standards, burdens, and organizations of proof developed under Title VII have been extended to federal claims of age-based employment discrimination. *Palmer v. United States,* 794 F.2d 534, 537 (9th Cir. 1986) ("The criteria applied to a Title VII discrimination claim also apply to claims arising under the ADEA."); *see also Trans World Airlines, Inc v. Thurston,* 469 U.S. 111, 121 (1985) (analyzing ADEA claim based on Title VII standards because the "the prohibitions of the ADEA were derived *in haec verba* from Title VII") (citation omitted).

An ADEA claim can be based on one or more of three different potential theories of relief: 1) age harassment (i.e., an age-hostile work environment); 2) disparate treatment (intentional discrimination based on age); and, 3) disparate impact (age discrimination resulting from facially neutral employment practices).*Sischo-Nownejad v Merced Community College Dist.,* 934 F.2d 1104, 1109 (9th Cir. 1991). In this case, Plaintiffs alleged age harassment and disparate treatment but do not claim that Defendant engaged in facially neutral practices that had a age-discriminatory disparate impact on its employees. Defendant argued that Plaintiffs' claims are procedurally barred and that unlawful discrimination did not occur. Defendant did not argue that its actions fell under any of the affirmative defenses available under the ADEA or Washington's Law Against Discrimination.

2. Washington's Law Against Discrimination ("LAD")
Washington also prohibits age discrimination as a matter of state law. Specifically, Wash Rev. Code § 49.60.180, provides, in pertinent part:

> It is an unfair practice for any employer:
>
> (1) To refuse to hire any person because of age, ...;
>
> (2) To discharge or bar any person from employment because of age ...;
>
> (3) To discriminate against any person in or in other terms or conditions of employment because of age....

Similar to federal law, Wash. Rev. Code § 49.60.030(2) creates a private right of action for violations of § 49.60.180, including awards of attorney fees, injunctive and compensatory relief, and any other remedy authorized by the federal Civil Rights Act of 1964 as amended (*i.e.,* Title VII).

*6 The elements of a state law age discrimination claim are virtually identical to those of an ADEA claim. The Washington Supreme Court looks to federal law as a non-binding source of guidance as to what § 49.60.180 requires because the LAD itself does not provide specific standards. *See, e.g., Grimwood v. University of Puget Sound,* 110 Wash. 2d 355, 361 (1988); *see also Woods,* 925 F.2d at 1199 (recognizing that in applying LAD, "Washington courts will look to federal law for guidance"). Washington has adopted the *McDonnell Douglas* test for disparate treatment cases brought under the LAD. *Id.* at 361-64; *Carle v. McChord Credit Union,* 65 Wash. App. 93, 97-102 (1992). Washington also applies the same basic test as federal courts to evaluate age-harassment/hostile environment claims brought pursuant to the LAD. *See, e.g., Glasgow v. Georgia-Pacific Corp.,* 103 Wash. 2d 401, 406-07 (1985); *Henderson v. Pennwalt Corp.,* 41 Wash. App. 547, 549-550 (1985). Washington constructive discharge law also is similar in scope and nature to that applied in the Ninth Circuit. *See, e.g., Glasgow,* 103 Wash. 2d at 408 (citing federal cases); *see also Binkley v. Tacoma,* 114 Wash. 2d 373, 388 (1990); *Reninger v Dep't of Corrections,* 79 Wash. App. 623, 632-33 (1995); *Stork v. Int'l Bazaar,* 54 Wash. App. 274, 287-88 (1989).

B. Procedural Issues

1. Scope of Claim
The ADEA requires that employees file a charge of unlawful discrimination with the Equal Employment Opportunity Commission ("EEOC") before bringing an action in federal court. 29 U.S.C. § 626(d). A federal court may only consider those claims of discrimination included in the EEOC charge and new claims that are "reasonably related to" those claims. *Sosa v. Hiraoka,* 920

F.2d 1451, 1456 (9th Cir. 1990). In assessing whether a court is barred from considering new claims that were not expressly made in the administrative charge, the court "must construe the charge liberally" and "inquire whether the original EEOC investigation would have encompassed the additional charges."*Id.* The court's jurisdiction "is not limited to the actual EEOC investigation, but can include the scope of an EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."*Id.*

Defendant argued that Plaintiffs should be precluded from proceeding on a disparate treatment theory of relief under the ADEA because Plaintiffs' EEOC complaint charged only that Smith was harassed based on age and did not specifically allege disparate treatment. The parties acknowledged that Plaintiffs filed the requisite charge of discrimination with the EEOC prior to filing this action and that no investigation was completed by the EEOC because Plaintiffs elected to file this action before it was completed.

Liberally construing the EEOC charge and the potential scope of the aborted EEOC investigation, Plaintiffs are not barred from proceeding on a combined constructive discharge-disparate treatment theory of relief. The term harassment does not exclusively pertain to a hostile environment claim and nowhere in the EEOC charge do the Plaintiffs specify that they were relying on either a hostile environment or disparate treatment theory of discrimination. Although the EEOC charge describes the discrimination that Smith alleges she suffered principally in terms of "harassment," it also explicitly alleges that she was constructively discharged as a result of that harassment. As discussed *infra,* constructive discharge can be alleged under either a hostile environment or disparate treatment theory of relief. Accordingly, the Court concludes that Plaintiffs are entitled to proceed on both their hostile environment and disparate treatment ADEA claims because both of these claims were within the scope of their EEOC charge and would likely have been the subject of any investigation of that charge by the EEOC.[3]

*7 Furthermore, Defendant suffered no prejudice notwithstanding its claim of surprise at trial by Plaintiffs' disparate treatment argument. Central to both of Plaintiffs' theories of relief is the necessity of showing that Smith was subjected to such severe age harassment that a reasonable person would have found that working environment hostile and abusive. In preliminary proceedings and at trial, Defendant's principal strategy of defense was to attack this central element. Thus, it was largely irrelevant to Defendant whether Plaintiffs chose to proceed under a hostile environment or disparate treatment theory of relief.

2. Statute of Limitations

Defendant also argued that Plaintiffs' federal claims were time-barred because Plaintiffs failed to file the EEOC charge that preceded this action within the 300 days required by 29 U.S.C. § 626(d)(2).[4]Section 626(d) bars employees from filing an action in federal court if they do not file their charge with the EEOC within the time periods established by § 626(d), unless equitable grounds justify tolling those provisions. *See Zipes v. Trans World Airlines,* 455 U.S. 385, 393 (1982); *Naton v. Bank of California,* 649 F.2d 691, 694-96 (9th Cir. 1981). These periods run from the date that "the alleged unlawful practice occurred." 28 U.S.C. § 626(d)(1)-(2).

The question here, as in most cases involving challenges to a plaintiff's compliance with § 626(d), focuses on when the last alleged unlawful practice occurred. Plaintiffs conceded that their charge, which was filed on March 3, 1995, was filed more than 300 days after the last age remark by the Store Manager. Plaintiffs argued, however, that because they have alleged that Smith was subjected to a hostile working environment that resulted in her constructive discharge, the date on which the 300 day filing period began to run was May 18, 1994, when she informed Kmart that she was resigning. If so, Plaintiffs' charge was filed within the requisite 300 day period.

It is well settled that in applying provisions like § 626(d), "mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination," as are acts that give "present effect to the past illegal act."*Delaware State College v. Ricks,* 449 U.S. 250, 257-58 (1980). As the Supreme Court explained in *Ricks*"[t]he emphasis is not upon the effects of earlier employment decisions; rather, it is upon whether a present violation exists."Hostile environment claims and constructive discharge claims premised on the existence of a hostile work environment are unlike the majority of discrimination claims, however, in that no single act is the sole subject of the allegation. Rather, it is the continuation of the hostile working environment and the resulting constructive discharge that constitute violations of the ADEA, not simply the last discrete act of harassment. *See, e.g., Hulsey v. Kmart, Inc.,* 43 F.3d 555, 558 (10th Cir. 1994) ("a constructive discharge, being the discriminatory act itself that gives rise to an age discrimination claim, should not be treated differently from any other adverse employment decision"); *accord Douchette v. Bethel Sch. Dist. No. 403,* 117 Wash. 2d 805, 815-17 (1991). Thus, Plaintiffs EEOC notice was

filed within the 300 day period required by § 626(d)(2) because Plaintiffs' filing period began to run on May 18, 1994, the date of her constructive discharge from Kmart.

*8 Defendant also argued that § 626(d)(2) precluded Plaintiffs from offering evidence of any acts of discrimination that occurred more than 300 days before Plaintiffs' EEOC charge was filed.[5] This limitations period does not apply, however, if the employee is able to show that the acts were part of either a systematic policy of discrimination or a series of related acts against a single individual. *See, e.g., EEOC v. Local 350, Plumbers & Pipefitters,* 982 F.2d 1305, 1308 (9th Cir. 1993); *Green v. Los Angeles Superintendent of Sch.,* 883 F.2d 1472, 1480 (9th Cir. 1989). Plaintiffs made a sufficient showing of a pattern of continuing discrimination to justify admission of prior acts of discrimination under the continuing violation doctrine as it has been elaborated by the Ninth Circuit. Thus, the Court is authorized to consider all acts of discrimination that constituted part of the alleged pattern of harassment of Smith by the Store Manager.

C. AGE HARASSMENT/HOSTILE ENVIRONMENT

1. Standard

Under the ADEA, an employer can be held liable if the employee's work is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment."*Harris v. Forklift Sys., Inc.* 114 S. Ct. 367, 370 (1993) (internal citations and quotations omitted); *see also Sischo-Nownejad,* 934 F.2d at 1109 (recognizing age harassment/hostile environment as viable ADEA claim). This "hostile environment" theory of relief recognizes that working in an environment where one is routinely harassed because of one's age is a statutorily proscribed term or condition of employment.

As a threshold requirement of any ADEA claim, an employee must first show that s/he falls within the class of individuals protected by the substantive prohibitions of the ADEA. This requirement is satisfied if the employee proves s/he is at least forty years old. 29 U.S.C. § 631(a); *O'Connor v. Consol. Coin Caterers Corp.,* 116 S. Ct. 1307, 1310 (1996). An employee that falls within this protected class must then prove the existence of an age-hostile work environment and that the employer knew or should have known of that hostile environment and failed to take adequate remedial action. *Fuller v. City of Oakland,* 47 F.3d 1522, 1527 (9th Cir. 1995) (citing *Ellison v. Brady,* 924 F.2d 872, 875-76 (9th Cir. 1991), *inter alia*).

a. Hostile Environment

To demonstrate the existence of an age-hostile working environment, an employee must prove three elements by a preponderance of the evidence. *Id.* First, the employee must show that s/he experienced age-related verbal or physical conduct at work. *Id.* As part of this showing, the employee must demonstrate a nexus between the complained of conduct and the employee's age. 29 U.S.C. § 623(a) (creating cause of action where employee is discriminated against "because of" age.); *Sischo-Nownejad,* 934 F.2d at 1109 ("A hostile environment requires the existence of severe ... harassment *because of*" a plaintiff's age). Although there is no requirement that the employee show that each of the alleged discriminatory acts was overtly ageist, the employee must show that s/he would not have experienced the complained of harassment "but for" the employee's age.[6] *See Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) (interpreting Title VII's use of "because of" as imposing a "but for" causation requirement); *Henson v. City of Dundee,* 682 F.2d 897, 904 (11th Cir. 1982) (Title VII plaintiff "must show that 'but for' the fact of her sex, she would not have been the object of harassment"). In assessing this element, a court must look at the totality of the work environment affecting the employee, not merely at conduct directed specifically or exclusively at the employee. *See, e.g., Woods v. Graphic Communications,* 925 F.2d 1195, 1201-02 (9th Cir. 1991) (considering incidents of racial harassment that occurred in plaintiff's workplace, including incidents not specifically directed at plaintiff); *Anthony v. County of Sacramento,* 898 F. Supp. 1435, 1444 n.9 (E.D. Cal. 1995) ("In the hostile environment context, there is no substantive requirement that all conduct contributing to the violation be directed specifically or exclusively at the plaintiff.").

*9 Second, the employee must also show that the age-related conduct was unwelcome. *Fuller,* 47 F.3d at 1527. The conduct must have been "unwelcome in the sense that the employee did not solicit or incite it" and "in the sense that the employee regarded the conduct as undesirable or offensive."*Henson,* 682 F.2d at 903;*see also Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 68-69 (1986) (employee's conduct, dress, *etc.* is relevant to determination of whether conduct was unwelcome). This inquiry usually focuses on the employee's subjective perception of the conduct at issue and, thus, "turns largely on credibility determinations committed to the trier of fact."*Vinson,* 477 U.S. at 68. Although the voluntariness of conduct by the plaintiff-employee relating to the

alleged harassment is relevant, voluntariness is not dispositive if the totality of the circumstances indicate that the alleged harassment was not welcome. *Id.* at 68-69.

Third, the employee must show that the unwelcome age-related conduct was so severe or pervasive that it rendered the work environment hostile and abusive.*Fuller,* 47 F.3d at 1527. The environment must be both objectively hostile and subjectively perceived as such by the victim. *Harris,* 114 S. Ct. at 370. Whether the employee subjectively perceived the environment to be abusive is a question for the trier of fact. Whether the environment was objectively hostile is an issue of law that is determined by the perspective of a reasonable person with the same fundamental characteristics as the plaintiff. *Fuller,* 47 F.3d at 1527.As the U.S. Supreme Court explained in *Harris,* the leading case on this issue,

> "this is not ... a mathematically precise test .... [W]hether an environment is hostile or abusive can only be determined by looking at all of the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

114 S. Ct. at 371.

In considering the objective hostility of Smith's work environment, Plaintiffs urged the Court to apply a "reasonable woman" standard. There are difficulties with the application of a reasonable person standard in this case. The foremost is that adoption of a reasonable person standard ignores the fact that our culture frequently shapes men and women in ways that result in differences in how they experience events. One of the areas in which such socially constructed differences sometimes surface is in the way that men and women react to age-related comments and conduct. Counsel for Defendant provided an excellent example of such a distinction at trial, habitually apologizing to female witnesses for asking their ages but failing to do so when making the same request of male witnesses. Further, there is sometimes a tendency to adopt a reasonable man's perspective when applying a reasonable person standard.

*10 The Court, however, declines to adopt Plaintiffs' suggestion for the following reasons. First, the incorporation of the potential existence of such distinctions into a formal standard of review, would necessarily lend a judicial imprimatur to these stereotypes, thus undercutting the gender equity goals of Title VII. While the propriety of recognizing such distinctions in the sphere of *gender* discrimination has been established, *Ellison v. Brady,* 924 F.2d 872, 878-80 (9th Cir. 1991), it is another matter altogether to incorporate purported gender distinctions into the more attenuated circumstances of an *age* discrimination case. Doing so necessarily detracts from the purpose of requiring an objective standard -- providing employers and fellow employees with some assurance that their actions will not be culpable simply because they offend an employee whose sensitivities are not shared by most members of our culture. One can easily anticipate arguments that courts should also consider differences in how individuals of different races, ethnicities, and religions perceive age, ultimately resulting in an "objective" prong that is little more than a mirror of the subjective prong of this test. Finally, having presided over the trial and closely scrutinized the demeanor and testimony of the men and women before the Court, the Court is convinced that adopting such a standard would have made no difference to the outcome of this case.

Thus, the Court construes *Fuller* and *Ellison* to require that district courts adopt the perspective of a reasonable person possessed of the same characteristic. In this case, the objective hostility of Smith's working environment was assessed from the vantage point of a reasonable person, neither male nor female, of the same general age as Smith.

b. Employer liability

In addition to proving that an age-hostile work environment existed, an employee must also prove that the employer may be held liable for the existence of that environment. *Fuller,* 47 F.3d at 1527. To accomplish this, the employee must show that the employer failed to remedy a hostile working environment that the employer knew, or should have known, existed. *Id.* The employer is not automatically liable simply because the source of the hostile environment was one of its employees; instead, a court must apply traditional principles pertaining to liability of a principal for the acts of its agents.*Vinson,* 477 U.S. at 72. This requirement is satisfied if an employee shows that remedial action was not taken after management-level personnel were informed of the harassing conduct or that the age-hostile nature of the environment was so obvious that management-level employees exercising reasonable care should have known of the existence of the hostile environment.*EEOC v.*

Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989).

Actual or constructive knowledge imposes on the employer the duty to remedy the hostile environment. *Fuller,* 47 F.3d at 1528;*see also Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied,*115 S. Ct. 733 (1995); *Intlekofer v. Turnage,* 973 F.2d 773, 777-81 (9th Cir. 1992). This duty has two components. First, the employer must take measures reasonably calculated to end the harassment, a standard that is assessed based on the employer's ability to stop the harassment at issue.*Fuller,* 47 F.3d at 1528. Second, those measures must be effective in remedying the hostile environment, with effectiveness being "measured by the twin purposes of ending the current harassment and deterring future harassment."*Id.* Thus, an employer that takes unreasonable or ineffective remedial measures does not avoid liability even if the harassment stops for other reasons. *Id.* at 1529.The existence of a company grievance procedure or an official policy prohibiting age harassment are relevant considerations in assessing the adequacy of an employer's actions but do not insulate an employer from liability where the employer fails to take reasonable and effective measures to ensure that the hostile environment is remedied. *Vinson,* 477 U.S. at 72; *Hacienda Hotel,* 881 F.2d at 1516. This applies even if the plaintiff-employee fails to take advantage of internal grievance procedures.*Hacienda,* 881 F.2d at 1516.

2. Discussion

*11 Defendant conceded at trial that Smith was entitled to protection under the ADEA and Washington's LAD and that the Store Manager made age related comments to Smith during the course of her employment at the Veradale Kmart. Although the Store Manager denied any recollection of making such comments, the testimony of both parties' witnesses established that these comments were relatively frequent, occurring on at least a weekly basis by the end of Smith's tenure. These witnesses also clearly demonstrated that the underlying cause of these comments was not age animus but the antagonistic work relationship that grew out of what Smith perceived to be the Store Manager's meddling in the affairs of the Fashions Department and the Store Manager's abrasive management style. Apart from those comments expressly directed to her age, Smith's age was neither a "but for" nor a substantial factor causing her antagonistic relationship with the Store Manager or comments to or about her; age was simply one of the buttons that the Store Manager pushed when he expressed his antipathy for Smith.

Smith demonstrated that these comments were unwelcome and offensive to her. Although Smith sometimes teased other employees regarding their age or replied to the Store Manager's comments with barbs of her own regarding his age and weight, these incidents were not sufficiently frequent to indicate that she solicited or incited the Store Manager's comments. Given the context of their rancorous relationship, it is difficult to conceive how the Store Manager could have perceived his comments as anything but unwelcome. Defendant's characterization of Smith's conduct as "giving as good as she got" underscores the depths to which the relationship between these two deteriorated over time, not that she welcomed or solicited the Store Manager's comments.

Smith also demonstrated that she personally viewed her work environment as hostile and abusive. There is little doubt that Smith's relationship with the Store Manager caused her distress. It is unclear, however, what role age played in that distress. The age related remarks and comments were but one manifestation of the underlying animus between these two individuals. While Smith complained to some of her fellow workers regarding the Store Manager's age comments, this was generally done in the context of complaining about the Store Manager's management style in general. Although, it is significant that none of her or the Store Manager's supervisors can recall Smith making any complaints regarding age remarks or harassment until after her departure from Kmart, on balance, the testimony of Smith and her fellow employees demonstrated that the Store Manager's age-related comments were at least a substantial factor in her perception of her work environment as hostile.

Smith failed, however, to demonstrate that the Store Manager's age remarks would have led a reasonable person of her age to believe that her work environment was hostile and abusive. Virtually all of Smith's coemployees, who were predominantly women between the ages of 40 and 60, viewed the Store Manager's comments as light hearted teasing and bantering. What made Smith's work environment hostile to her was her unique sensitivity to the Store Manager's comments that resulted from the underlying animus between her and the Store Manager. A reasonable person of Smith's age, male or female, would likely have found the Store Manager's age comments insensitive but would not have found that they constituted a level of harassment sufficient to render her workplace hostile and abusive.

*12 Moreover, even if Smith had shown that her work environment was objectively hostile and abusive because of the age remarks, she failed to prove that Defendant knew or should have known of the existence of that environment. Smith showed that her supervisors and the

Store Manager's supervisors knew of the antagonistic relationship between the Store Manager and Smith. Each of these management level employees -- Collyear, Martin, Morck, Johnson and Boes -- admitted that Smith had discussed her concerns regarding the Store Manager with them. Each, however, consistently characterized her complaints as being directed to the Store Manager's "macho" management style and vulgar language rather than to age remarks or age harassment. Similarly, Smith's medical records indicate she told her doctors that her relationship with the Store Manager was causing her stress, but none of these records reflects that Smith discussed age remarks or harassment. Even Smith's resignation letter fails to mention the age harassment that she now alleges compelled her to resign. Finally, while Smith did tell some of her subordinates and fellow employees at the Veradale Kmart that she did not care for the Store Manager's age comments, these same employees almost universally viewed these comments as lighthearted and inoffensive. Without more, conditions such as these are insufficient for this Court to find that Defendant had either actual or constructive notice of the age harassment that Smith alleges she suffered.

D. DISPARATE TREATMENT-CONSTRUCTIVE DISCHARGE

1. Standards

a. Disparate Treatment

An employer can be held liable under the ADEA for intentionally discriminating against an employee in the terms or conditions of employment because of age.*Sischo-Nownejad,* 934 F.2d at 1109. In attempting to prove disparate treatment, an employee may rely on direct or circumstantial evidence, or on a combination of both. *See United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 714 n.5 (1983). Regardless of whether the plaintiff relies on direct or circumstantial evidence, the core inquiry remains the same: whether the employee proves by a preponderance of the evidence that age was a "determining factor" in the challenged employment action. *Cassino v. Reichold Chem. Inc.,* 817 F.2d 1338, 1343-44 (9th Cir. 1987), *cert. denied,*484 U.S. 1047 (1988). As with a hostile environment theory of relief, this inquiry has been interpreted as requiring that the employee show s/he would not have been discriminated against "but for" the employee's age. *Id.;Cancellier v. Federated Dep't Stores,* 672 F.2d 1312, 1316 (9th Cir.), *cert. denied,*459 U.S. 859 (1982); *but see Mackay,* 127 Wash. 2d at 310 (Washington's LAD only requires proof that age was a "substantial factor").

If the employee relies in whole or in part on circumstantial evidence, the employee may attempt to prove unlawful discrimination under a shifting, three-phase organization of proof derived from *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Sischo-Nownejad,* 934 F.2d at 1109;*see also O'Connor,* 116 S. Ct. 1309-10 & n.2 (assuming that *McDonnell Douglas* applies to ADEA disparate treatment cases and noting that eleven federal circuit courts have applied *McDonnell Douglas* to ADEA). Under the initial phase of the *McDonnell Douglas* approach, the employee must produce sufficient evidence to make out a *prima facie* case of age discrimination. The employee satisfies this initial burden by showing by a preponderance of the evidence that s/he:

***13** 1) was at least forty years old;

2) was discharged or subjected to some other change in the compensation, terms, conditions or privileges of employment;

3) was performing satisfactorily prior to the discharge or change; and,

4) was replaced by a substantially younger person with equal or inferior qualifications.

Sischo-Nownejad, 934 F.2d at 1110 n.7; *Cassino,* 817 F.2d at 1343. A rebuttable presumption of unlawful discrimination is created if the employee is able to carry this initial burden. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507 (1993).

Once an employee has produced sufficient evidence to establish a *prima facie* case of discriminatory treatment, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the alleged discriminatory conduct or decision. *O'Connor,* 116 S. Ct. at 1308. To meet this burden:

> [T]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action.

Hicks, 509 U.S. at 507. The employer's burden is limited to producing admissible evidence sufficient to justify judgment in its favor and does not extend to the burden of persuading the trier of fact that the employer was actually motivated by those reasons. *Id.;Texas Dep't of*

Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If the employee has met the initial burden of establishing a *prima facie* of age discrimination and the employer fails to articulate a legitimate non-discriminatory reason, the employee is entitled to a directed verdict. *O'Connor,* 116 S. Ct. at 1308.

If the employer carries its burden of articulating a legitimate non-discriminatory reason, the presumption of unlawful discrimination is rebutted.*Hicks,* 509 U.S. at 508. The employee now bears the burden of proving that the employer's proffered reasons are merely a pretext for unlawful discrimination, a burden that merges with the employee's burden of persuasion on the question of whether intentional discrimination has occurred. *Hicks,* 509 U.S. at 507-08. The employee may simply show that the employer's reasons are not credible and need not produce additional proof of discrimination.*Id.* at 511.Such a showing does not entitle the employee to judgment unless, when considered with the *prima facie* elements of the case, the employee's evidence is sufficient to carry the employee's ultimate burden of persuading the trier of fact that the employee was intentionally discriminated against because of age. *Id.*

b. Constructive Discharge

An employee who resigns from employment because of age discrimination can state a constructive discharge claim in conjunction with a discrimination claim. If the core discrimination claim is one based on a hostile environment theory of relief, proof of constructive discharge allows an award of back pay.*Satterwhite v. Smith,* 744 F.2d 1380, 1381 n.1 (9th Cir. 1984); *see generally* Sheila Finnegan, Comment, *Constructive Discharge under Title VII and the ADEA,* 53 U. Chi. L. Rev. 561 (1986). If the claim pertains to a disparate treatment claim, the constructive discharge, if proved, constitutes the unlawful employment action that provides the basis of the claim. *Nolan v. Cleveland,* 686 F.2d 806, 811 (9th Cir. 1982).

***14** To show that s/he was constructively discharged, an employee must prove two basic elements, apart from injury. First, the employee must demonstrate that the totality of the circumstances indicates that a reasonable person in the employee's circumstances would have found the working situation so "intolerable and discriminatory" that quitting was the only reasonable option. *See Satterwhite,* 744 F.2d at 1381-83 (comparing cases). Second, the employee, must show that those conditions caused her departure. *See, e.g., Steiner* 25 F.3d at 1464 (dismissing constructive discharge claim, in part, because employee's departure was not causally linked to alleged harassment). The employee is not required to show that the employer intended to force her to quit. *Watson v. Nationwide Ins. Co.,* 823 F.2d 360, 361 (9th Cir. 1987); *Bulaich v. AT&T Info. Sys.,* 113 Wash. 2d 254, 260-62 (1989).

The "intolerable and discriminatory conditions" component of this doctrine requires that the employee demonstrate more than just that s/he has been subjected to unlawful discrimination. In addition, the employee must prove the existence of "aggravating factors" that warrant viewing the work place as so intolerable that quitting was justified. *Thomas v. Douglas,* 877 F.2d 1428, 1434 (9th Cir. 1989). To meet this requirement, the employee must show that there was either a continuing pattern of disparate treatment or that age-harassment in the workplace was so severe that the employee could not reasonably have been expected to continue on the job. *Id.* Moreover, the workplace must be intolerable at the time the employee quits, either because of an ongoing, unremedied pattern of disparate treatment that justifies quitting or because of ongoing age harassment. *See, e.g., Steiner,* 25 F.3d at 1465-66 (rejecting constructive discharge in hostile environment case where harasser was fired two months before employee quit). It is enough, however, that the harasser remains in the work environment unchecked by adequate remedial measures by the employer; the victim need not actually be subjected to a specific act of harassment in the days or weeks immediately preceding departure. *Cf. Ellison,* 924 F.2d at 883.

2. Discussion

The same flaws that are fatal to Smith's hostile environment claim condemn her disparate treatment-constructive discharge claim. At trial, Smith elected to present this claim principally through circumstantial evidence of age discrimination under the *McDonnell Douglas* standard. In doing so, she successfully demonstrated three of the four required elements of a *prima facie* case of age discrimination: 1) that she was at least forty years old; 2) that she was qualified for the position from which she resigned; and, 3) that she was replaced by a substantially younger worker of equal or inferior qualifications. Smith failed, however, to demonstrate the core requirement that she was discharged or otherwise discriminated against with regard to her compensation, terms, conditions, or privileges of employment because of her age.

***15** Smith attempted to meet this requirement by proving that she was subjected to such severe age harassment that a reasonable person in her circumstances would have felt

compelled to quit; *i.e.,* that she was constructively discharged. For the reasons discussed *supra,* however, she failed to demonstrate that she was subjected to the type of intolerable and discriminatory conditions that would justify her departure. Although it is not clear if proof of the existence of an aggravating factor based on a pattern of age harassment requires a greater showing with regard to the abusive or hostile nature of the workplace than is required to state a hostile environment claim, failure to prove that the environment was hostile and abusive necessarily constitutes a failure to prove that the working conditions were intolerable. Here, Smith has been unable to show that she was subjected to an age-hostile work environment and, thus, is unable to demonstrate she was subjected to the type of intolerable conditions that justified her departure.

Moreover, even if she had been able to demonstrate that she had been constructively discharged, Smith's claim would fail. In response to Smith's claims, Defendant articulated a legitimate nondiscriminatory reason for Smith's resignation: her desire not to work under the Store Manager after the Stores Project was implemented at the Veradale Kmart. This placed on Smith the burden of proving that Defendant's reasons were pretextual and that the Store Manager's age comments were a substantial or but for factor in her departure. Smith failed to carry her ultimate burden of persuading the Court by direct and/or circumstantial evidence that age harassment was either a but for or substantial factor in her departure. After considering all of the evidence, the Court concludes that Smith's departure was motivated by her personal animus toward the Store Manager and the prospect that she would soon be required to work for him, and that the Store Manager's age-related conduct played at most a minimal role in her decision to leave Kmart.

III. NEGLIGENT SUPERVISION/RETENTION

A. STANDARD

Washington law holds employers liable for injuries that are caused by the employer's negligent supervision or retention of an employee. To prevail on a negligent supervision claim, a plaintiff must prove the following elements by a preponderance of the evidence:

1) the employee presented a risk of harm to others;

2) the employer knew, or in the exercise of reasonable care should have known, that the employee presented such a risk;

3) the employer's failure to adequately supervise the employee was the proximate cause of injury to the plaintiff.

Niece v. Elmview Group Home, 79 Wash. App. 660, 667 (1995), *review granted,* 129 Wash. 2d 1005 (1996); *see also La Lone v. Smith,* 39 Wash. 2d 167 (1951) (seminal case). The elements of the closely related tort of negligent retention are essentially the same, except that instead of presenting a risk of harm, the employee must be incompetent and the employer must know, or have reason to know, of that incompetence. *See Peck v. Siau,* 65 Wash. App. 285, 288,*review denied,* 120 Wash. 2d 1005 (1992).

B. DISCUSSION

*16 Plaintiffs' negligent supervision and retention claims present a closer case than her age discrimination claims. The principal reason is that these claims are not limited to age animus or to age-related conduct. Thus, the Court may consider the entirety of the interactions between the Store Manager, Smith and their supervisors in evaluating whether Defendant negligently supervised or retained the Store Manager.

At trial, Defendant argued that unless an employee presents a risk of *physical* harm to others, a negligent supervision claim must fail. In support, Defendant argued that no Washington court has imposed liability under a negligent supervision theory of relief absent evidence that an employee directly inflicted physical harm on someone. No Washington court, however, has declined to impose liability simply because the risk of harm presented by the employee was not one of physical harm. Moreover, Defendant's interpretation is not supported by the broad language used by the Washington Supreme Court in the seminal case of *La Lone,* which dealt with a case involving physical harm but also noted that "the dangerous quality in an agent may consist of his incompetence or unskillfulness."39 Wash. 2d at 171-72. Defendant's argument also runs counter to the general trend of modern tort law toward greater recognition of mental and emotional harm and the common sense conclusion that, in some spheres, an inadequately supervised employee can present a great risk of economic harm. Absent more explicit guidance from the courts of Washington, it would be imprudent for this Court to create a requirement that would preclude relief for mental or economic harms caused by an employer's negligent supervision of an employee.[7]

Nonetheless, Plaintiffs' state law tort claims also fail on their merits. As to the negligent retention claim, Smith

failed to make any showing whatsoever that the Store Manager was incompetent. To the contrary, the evidence adduced at trial demonstrated that his performance was consistently evaluated as a satisfactory or better.

As to her negligent supervision claim, Smith failed to demonstrate that the Store Manager presented the type of risk of harm to others that would warrant holding Kmart liable for her injuries and economic loss. Smith demonstrated that the Store Manager's management style was loud and abrasive and that he was warned several times that this was an inappropriate management style. Although a showing of risk of physical harm is not necessary to the tort of negligent supervision, merely showing that an employee has a personality clash with an abrasive fellow employee is insufficient to demonstrate the risk of harm that is necessary to demonstrate negligent supervision.

IV. CONCLUSION.

In summary, Plaintiffs failed to demonstrate that Smith was subjected to unlawful age discrimination under federal or Washington law, or that Defendant negligently supervised or employed the Store Manager. The heart of Plaintiffs' case is that the Store Manager's ageist remarks amounted to age harassment that created a hostile working environment. Employment discrimination law mandates that employers not discriminate against their employees in the compensation, terms, conditions and privileges of their employment because of age or other forms of prohibited discrimination. Although this mandate requires that employers not subject their employees to a work environment that a reasonable person would find abusive and intolerable because of age harassment, it does not protect employees from abrasive managers or guarantee a stress free work place. After carefully weighing the evidence and considering the credibility of the witnesses, the Court recognizes that Smith did in fact perceive her work environment to be hostile and abusive. This perception, however, derived principally from the antagonistic relationship between Smith and the Store Manager, the underlying roots of which was personal antipathy and professional conflicts, not age animus. While the Store Manager's ageist comments played a role in Smith's perception of her environment as hostile and abusive, a reasonable person of her age would not have found that those comments rendered her work conditions hostile and intolerable.

*17 Although the Court does not endorse the management style of the Store Manager or the reaction of the supervisors when they became aware of the conflict between these two employees, Smith's inability to show that a reasonable person in her circumstances would have found the Store Manager's age-related conduct abusive and her working conditions intolerable means that Plaintiffs are not entitled to the legal relief they seek.

Accordingly, IT IS HEREBY ORDERED:

Having reviewed the record, heard from counsel, and been fully advised in this matter, judgment is entered for Defendant on all of Plaintiffs' claims.

IT IS SO ORDERED. The Clerk is directed to enter this order and to provide copies to counsel.

All Citations

Not Reported in F.Supp., 1996 WL 780490

Footnotes

1 That employee was originally a codefendant in this action. The employee's motion to be dismissed as a party was granted at trial because none of the claims that survived pretrial motions is cognizable against the employee. *See Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied sub nom, Miller v. La Rosa*, 510 U.S. 1109 (1994) (liability under ADEA is limited to employers); *La Lone v. Smith*, 39 Wash. 2d 167, 171-72 (1951) (describing negligent supervision as cause of action against an employer/principal).

2 Pertinent distinctions between Washington and federal age discrimination law are discussed *infra* in conjunction with the relevant federal standards.

3 At any rate, Plaintiffs would have been able to proceed on both of these theories under Washington's LAD since Defendant's challenge was confined to Plaintiffs' ADEA claims.

4 The 300 day period set forth in § 626(d)(2) controls this case rather than the 180 day period of § 626(d)(1) because the acts occurred in Washington, which also prohibits age discrimination.

5 Defendant makes a similar statute of limitations argument with respect to Washington's LAD. Washington law, however, also includes a continuing violation exception similar to that applied by the Ninth Circuit. *See Goodman v. Boeing Co.*, 75 Wash. App. 60, 76-77 (1994), *aff'd*,127 Wash. 2d 401 (1995).

6 Under the LAD, Washington has rejected this interpretation of "because of" and only requires that the employee show that age was a "substantial" factor with regard to the allegedly unlawful acts. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wash. 2d 302, 310 (1995). The Washington Supreme Court has described this test as a middle ground between the more exacting "but for" approach and an approach that requires only that an employee show that a discriminatory purpose was a factor "to any degree." *Allison v. Housing Authority of Seattle,* 118 Wash. 2d 79, 85-96 (1991).

7 Defendant also argued that one of the required elements of a negligent supervision claim is that the employee have acted outside of the scope of employment. Defendant derived this interpretation from its view of Washington case law, which it argued has yet to apply this tort in a case where the employee acted within the scope of employment. While it appears that the Washington courts have only applied this tort in cases involving conduct that falls outside the scope of employment, no Washington court has explicitly stated that the tort only applies in such cases. Thus, it is not clear whether the courts of Washington have adopted Defendant's interpretation of this tort or simply have never been presented with such a case because plaintiffs are more likely to argue *respondeat superior* liability for conduct that falls within the scope of employment.

The Ninth Circuit, on the other hand, has interpreted Washington's negligent supervision tort as being applicable to conduct *within* the scope of employment. *Simmons v. United States,* 805 F.2d 1363, 1371 (9th Cir. 1986). Under *Simmons,* all that is required is that the employer "should have known of the negligent acts of a subordinate."*Id.* (citing *La Lone v. Smith,* 39 Wash. 2d 167, 171 (1951)). Because the courts of Washington have not clearly indicated that conduct within the scope of employment is excluded from the tort of negligent supervision, this Court is compelled to follow the reasoning of the Ninth Circuit.

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CERTIFICATE OF SERVICE

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Clerk's Office
950 Broadway, Suite 300
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